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The Madras Law Journal.

PART III.] JULY, 1916. [VOL. XXXI.

Palaniandi Chetty v. Appavu Chettiar [1].

(Avoidance of Fraudulent Transfers—Necessity for Representative Actions.)

The recent decision of Coutts-Trotter and Seshagiri Aiyar, JJ. in the above case requires more than a passing notice. The suit was by a defeated claimant for a declaration that he was the absolute owner of the suit property by purchase and that it was not liable to be attached by the defendants in execution of a decree obtained by them against his vendor. The defendants contended (i) that the sale in favour of the plaintiff was merely colorable and passed no title to him and (ii) that it was in any event fraudulent and void as against them as it had been made with intent to defraud and defeat the creditors of the transferor. The Courts below found that the sale had been made with the intent alleged, held that it was binding to the extent of Rs. 9,000 and odd, the total consideration being Rs. 12,000 and odd, and dismissed the suit as regards the rest of the claim, They did not consider the plea that the sale was merely colorable. In Second Appeal a contention was raised for the first time that, as the defendants had not sued to set aside the transfer in favour of the plaintiff before they attached the suit property in execution of their decree, they were not entitled to resist the claim of the plaintiff in that suit. Both the learned Judges gave effect to this contention, reversed the decisions of the courts below on this ground, and sent the case back for a finding on the other question, *viz.*, whether the sale was a merely colorable transaction, Coutts-Trotter, J. thought that a suit brought by or on behalf of all the creditors of the transferor was necessary, while Seshagiri Aiyar, J. was of opinion that, though a representative action was not necessary and any person who was defrauded or defeated could impeach the transfer, still a suit to set aside the transfer was necessary, the creditors could have no remedy against the conveyed property until the transfer was so set aside, and the plea based on S. 53 of the Transfer of Property Act could not be set

1. (1916) 30 M. L. J. 565.

up in defence. Seshagiri Aiyar, J. held that there was no distinction in this respect between the case of a judgment-creditor and that of an ordinary creditor; but Coutts-Trotter, J. (as we read some portions of his Lordship's judgment) seems to have been of opinion that, though a judgment-creditor is not, as such, better than an ordinary creditor, yet, if he has gone further and attached the properties in execution, he is for the present purpose in a better position. We, however, find no little difficulty in reconciling this opinion with the actual decision of his Lordship, for, admittedly, there has been an attachment in the case which gave rise to the claim proceedings.

We have reason to believe that the decision has been regarded in several quarters as being at variance with long and well established practice in this country. (See the observations of Sundara Aiyar, J. in *Subramania Pillai* v. *Dakshinamurthy Mudaliar* [1] and the judgment of D. Chatterjee and N. Chatterjee, JJ. in *Abdul Kadir* v. *Ali Mia* [2] neither of which cases is referred to in the decision under notice). In view of this circumstance of the difference of opinion between Coutts-Trotter and Seshagiri Aiyar, JJ. on certain material steps in the reasoning, and of the evident inconsistency between the reasoning and the conclusion in the judgment of Coutts-Trotter, J. it seems desirable to examine the correctness of the actual decision in the case under notice and of the opinions of the learned judges as to (a) the necessity or otherwise for a representative action to set aside a fraudulent transfer, (b) the availability in defence of the plea based on S. 53 of the Transfer of Property Act, and (c) the existence or non-existence of a distinction in this respect between the case of a judgment-creditor and that of an ordinary creditor.

The provision in S. 53 of the Transfer of Property Act is that every transfer of immovable property, made with intent to defraud or to defeat or delay *the creditors* of the transferor is voidable at the option of *any person* so defrauded, defeated or delayed. The section, it will be noticed, uses different language in describing the scope of the intent required and the party who can avail himself of the section. While the intent required to vitiate the transaction is an intent to defeat the general body of creditors, the transaction is declared to be voidable at the option

1. (1912) 15 I. C. 193. 2. (1912) 15 C. L. J. 649=16 C. W. N. 717.

of any person so defeated. It would thus seem to follow from the terms of the section (apart from any precedents, English or Indian) that any one of the creditors may, without reference to the others, avoid the transfer although the necessary averments must be made to show that the transfer was made with intent to defeat the general body of creditors, and not merely this or that creditor of the transferor. As to the question whether the plea based on S. 53 can be set up in defence, it will be noticed that the section only declares the substantive right of the creditor and prescribes no particular procedure for exercising the option of avoiding the transfer; any act on the part of the creditor affected would *prima facie* seem sufficient, if it unmistakably manifests his intention to treat the transfer as not valid and effectual as against him. And this leads us to the further question whether there is any general principle of law which requires such right to be exercised only by a suit. Lastly, as to the question whether there is any distinction for the present purpose between a judgment-creditor and an ordinary creditor, the section itself makes no distinction between them. The decision of the question will therefore depend upon the true ratio *decidendi* of certain English precedents which seem to suggest such a distinction and on the applicability in India of the principle underlying the same.

In support of the view that a representative action is necessary Coutts-Trotter, J. relies upon the cases of *Reese River Silver Mining Co.* v. *Atwell* [1], *Burjorj Dorabji Patel* v. *Dhunbai* [2], *Hakim Lal* v. *Mooshahar Sahu* [3], and *Ishvar Timappa* v. *Devar Venkappa* [4]. The learned Judge remarks, evidently by way of stating the reason of the rule, "the inconvenience of allowing each and every creditor in turn to attack the deed is obvious." Seshagiri Aiyar, J., who is of the contrary opinion, lays stress on the fact that the language of S. 53 is clear that any person defeated could impeach the transfer and observes that the English cases themselves do not in unmistakable terms lay down that a representative action is necessary. In answer to the argument of inconvenience from a possible multiplicity of suits, the learned judge points out that, by virtue of explanation VI to S. 11 of the Code of Civil Procedure, 1908, the decision in a suit brought by one of the creditors will be binding on other creditors as well. The learn-

1. (1869) L. R. 7 Eq. 347.
2. (1891) I. L. R. 16 B. 1.
3. (1907) I. L. R. 34 C. 999.
4. (1902) I. L. R. 27 B. 146.

ed judge considers that the Indian decisions relied upon by his learned colleague are not of binding authority for the reasons stated in his judgment and to be noticed below.

As to the law in England, there is nothing in the Statute 13th Eliz. C. 5, or in any other statute we are aware of, which requires that an action to set aside a fraudulent conveyance should be a representative action. But the following passage at p.89 of Vol. 15 of Halsbury's Laws of England fairly represents the view stated by most text-writers on the subject: "In an action to set aside an alienation under the statute a creditor should sue on behalf of himself and all other the creditors of the grantor, except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation void as against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts." (For similar statements of the rule see May on "Fraudulent and Voluntary Dispositions of Property," 3rd Ed. p. 311; Daniell's Chancery Practice, 7th Ed. Vol. I, p. 171; Smith's Leading Cases, 12th Ed. Vol. I, p. 27; and White and Tudor's Leading Cases in Equity, 8th Ed. p. 902). Forms Nos. 2 and 3 given at pp. 2345 and 2346 of Vol. 2 of Seton's Judgments and Orders (6th Ed.) only show that the practice is to make an order declaring the alienation void as against all the creditors. Most of the text-books above referred to cite the case in L. R. 7 Eq. 347 in support of the rule that a representative action is necessary in cases in which the suit is brought by an ordinary creditor and the cases of *Smith* v. *Hurst* [1], *Spirett* v. *Willow's* [2], *Neale* v. *Day* [3], and *Blenkinsopp* v. *Blenkinsopp* [4], in support of the exception in favour of a judgment creditor. Some of them cite also *Bott* v. *Smith* [5], *Cornish* v. *Clark* [6], *Re Maddever, Three Towns Banking Co.* v. *Maddever* [7], *Re Mount* [8], and Ideal *Bedding Co.* v. *Holland* [9], in support of the rule.

The decision in *Reese River Silver Mining Co.* v. *Atwell* [10] affords no clue as to the basis of the rule for which it is commonly cited. So far as one can judge from the report of the case,

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1. (1852) 10 Hare 30=68 Eng. Rep. 826. 2. (1865) 11 Jur. (N. S.) 70.
3. (1858) 28 L. J. (Ch.) 45.
4. (1852) 1 De. G. M. & G. 495 C. A.=42 Eng. Rep. 644.
5. (1857) 21 Beav 511=52 Eng. Rep. 957. 6. (1872) L. R. 14 Eq. 184.
7. (1884) 27 Ch. D. 523. 8. (1899) 1 Ch. 831.
9. (1907) 2 Ch. 157. 10. (1869) L. R. 7 Eq. 347.

the question of the necessity for a representative action does not appear to have been raised and considered. The report only shows that, at the close of the arguments, counsel for plaintiffs asked leave to amend by making the plaintiffs sue on behalf of themselves and all the other creditors of the defendant and that Lord Romilly M. R. gave the leave prayed for. The case can therefore be taken only to show that the practice in England is for the creditor to bring a representative action only. The cases of *Re Mount* [1], *Ideal Bedding Co.* v. *Holland* [2], *Cornish* v. *Clark* [3] and *Bott* v *Smith* [4] do not consider or decide the point. It was not even raised. All that we find from the reports of these cases is that in each of them the action was as a matter of fact brought by the plaintiff on behalf of himself and all other creditors of the transferor.

In *Crossley* v. *Elworthy* [5], the plaintiff was a person who had obtained a judgment for the recovery of a sum of money but whose attempt to put his judgment in force was stopped by a fraudulent settlement made by his judgment-debtor. He therefore sued to have the settlement declared fraudulent and void as against himself under the provisions of 13 Eliz. C. 5. The action, which was originally instituted against the judgment-debtor and the assignees under the fraudulent settlement, was not a representative action at all. In the course of the action the judgment-debtor was adjudicated a bankrupt and was thereafter represented by the assignees in bankruptcy. All that we gather from the report relevant to the present discussion is that counsel for the assignees in bankruptcy submitted that the proper form of decree would be to declare the settlement void as against all the creditors (p. 162) and that counsel for the plaintiff conceded that it was the proper form (see the remarks of Malins V. C. at p. 163). It will be noticed that the argument was directed to the form of the decree and not to the frame of the suit. In the case of *Re Maddever, Three Towns Banking Co.* v *Maddever* [6] also, although a specialty creditor sued on behalf only of himself and no objection was taken to the frame of the suit, the decree gave a declaration that the conveyance in question was void as against the plaintiff and the other creditors of the deceased debtor and the judgment also declared the deed void as against the plaintiff and all other, *if any*, the

1. (1899) 1 Ch. 831. 2. (1907) 2 Ch. 157.
3. (1872) L. R. 14 Eq. 184. 4. (1857) 21 Beav. 511=52 Eng. Rep. 957.
5. (1871) L. R. 12. Eq. 158. 6. (1884) 27 Ch. D. 523.

creditors of the deceased debtor. North J. observed in the course of his judgment (p. 529) "The decree, therefore, will be a declaration that the conveyance is void against the plaintiffs and the other creditors of Maddever deceased (the debtor). *It must be as against the other creditors also as matter of form, although it does not appear there are any others.*" This and the previous case recognise the maintainability of a suit by a creditor on his own account, although the decree in such action will be for the benefit of creditors generally.

The case of *Adames* v *Hallett* [1] carries the matter no further. The only point which arose for decision there was whether a creditor under a voluntary post-obit bond was entitled to the benefit of the Statute 13 Eliz. C. 5. The bill was for the administration of the estate of a deceased debtor and the question was incidentally raised as to whether a settlement made by the deceased in respect of a portion of his property was not fraudulent and void as against the plaintiff. When the settlement was found to be fraudulent and Giffard, V. C. gave judgment for the plaintiff and stated that there would be the ordinary declaration, counsel for the plaintiff referred to *Spirett* v. *Willows* [2] in which the declaration was that the deed was fraudulent and void as against the plaintiff. But Giffard, V. C. said that he could not make a declaration in that form as there might be other debts, and that the deed must be declared void as against all the creditors.

Vyse v. *Brown* [3] and *Gregg* v. *Bromley* [4] referred to in the judgment of Seshagiri Aiyar, J. do not seem to have any bearing on the question. The decision in the first of these cases was to the effect that, when a legacy payable to a person under a will was assigned by the legatee to the executor under the will, and the assignment was liable to be impeached as one in fraud of creditors, there was no debt, legal or equitable, payable by the executor to the legatee which could be attached by a judgment-creditor of his under S. 61 of the Common Law Procedure Act, 1854, as the assignment stood good as against the legatee. Williams, J. observed in the course of his judgment: "Even supposing that the *plaintiff* (*judgment-creditor*) *had taken the*

1. (1868) L. R. 6 Eq. 468.
2. (1865) 11 Jur. (N. S.) 70.
3. (1884) 13 Q. B. D. 199
4. (1912) 3 K. B. 474 C. A.

proper steps to set aside the settlement as void and had succeeded in doing so, even then Brown (the executor and assignee) could never have been placed in the position of being obliged to pay over the money to Vyse (the legatee and judgment-debtor) ; the settlement would be valid and subsisting between the parties ; and, although in *such a suit* Brown might be directed to pay over the whole or a sufficient part of the settled fund to the creditor, that could not be by reason of his becoming indebted to the judgment-debtor." Whatever may be the bearing of the italicised passage on the question whether a suit, representative or not, is the only procedure open for avoiding a fraudulent transfer, it is clear that it has no bearing on the question we are now considering. As to *Glegg* v. *Bromley* [1] the only question for decision there was whether a judgment-creditor could in garnishee proceedings challenge an assignment by his judgment-debtor on the ground of its being fraudulent under 13 Eliz. C. 5, the argument for the assignee being (p. 476) that, even if the assignment could have been attacked as being in fraud of creditors, the objection was not one that could be taken in garnishee proceedings. The Divisional Court had over-ruled the contention of the assignee, and, as the court of appeal held that the assignment was not fraudulent, it became unnecessary for it to consider the present question. It will be noticed that this case also has a bearing only on the question of the necessity for a suit to set aside a fraudulent transfer.

From the above resume it will be seen that there is no rule of law even in England that a suit to set aside a fraudulent conveyance should be brought by or on behalf of all the creditors though the decree in such a suit always declares the conveyance void as against all the creditors. We have not been able to find any case in which the question has been raised and discussed or any holding that an action, not purporting to be a representative, proceeding, is liable to be dismissed on that ground unless, of course, an amendment is allowed. The form of the declaration is presumably due to the language of the Statute which declares the conveyance null and void as against *the creditors*, their heirs, etc., and assigns.

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1. (1912) 3 K. B. 474 C. A.

It may not be out of place here to refer briefly to the rule in America where too the statute of Elizabeth is substantially the basis of the law on the point. The American Cyclopedia of Law and Procedure states the law thus: A creditor desirous of setting aside a fraudulent conveyance may bring the suit in his own name and for his own benefit, without making other creditors standing in the same situation parties or do so in his own name and on behalf of himself and other creditors, all sharing alike whose claims are in the same class (Vol. 20, p. 711). A decree avoiding a deed as to creditors of the grantor is binding only as to such creditors (*Ibid.*, p. 821); and, as a general rule, the judgment or decree avails the plaintiff only and not those who are neither parties nor privies to the proceedings. Other creditors of the same class may, however, take advantage thereof in proper time and by proper pleadings (*Ibid.*, p. 822). It would thus appear that in America also there is no rule requiring a representative action for the purpose of setting aside a fraudulent transfer.

(*To be continued.*)

A. S. VISVANTHA AIYAR.

SUMMARY OF ENGLISH CASES.

British and Foreign Marine Insurance Co., Ltd. *v.* **Samuel Sanday and Co.**: (1916) A. C. 650.

Marine Insurance Policy—Construction—Constructive total loss of goods—Restraint of Princes—Meaning—Declaration of War—Frustration of contemplated adventure—Effect.

British merchants who had insured goods with British underwriters against the usual perils in a marine policy (including restraints of princes) upon a British ship for voyage to the port of Hamburg could, upon war being declared by His Majesty the King of England, whereby the further prosecution of the insured voyage to that port became illegal, give notice to the underwriters of abandonment, and recover as for a constructive total loss of the goods by restraint of princes, though the goods themselves remain unharmed and in the actual possession of the assured.

The declaration of war is the direct cause of the adventure being destroyed, although its only effect was to bring about a state of war during the existence of which trading with the enemy was, according to the common law, illegal.

Potential as distinguished from actual physical force is sufficient to constitute a " restraint " within the meaning of the policy.

"Constructive total loss" is, subject to any express provision in the policy, defined to occur when the subject-matter insured is reasonably abandoned on account of actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

Herbert Morris, Ltd. *v.* **Saxelby**: (1916) A. C. 688.

Contract—Restraint of Trade—Validity—Public Policy—Contract between vendor and purchaser of goodwill of business—Contract between master and servant and between employer and employee—Distinction.

In this case their Lordships had to consider the validity of an agreement in restraint of trade between the plaintiff company, the leading manufacturers of hoisting machinery in the United Kingdom, and the defendant, who had been employed in the plaintiff company as draughtsman. The agreement was taken when, after several years' service, the defendant was

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engaged by the company as engineer and provided, *inter alia*, that the defendant should not, for a period of seven years from his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise, alone or jointly or in connexion with any other person, firm or company, or be concerned or assist directly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways or hand overhead travelling cranes. It was held, having regard to all the circumstances of the case that the agreement was not reasonable in reference to the respective interests of the parties concerned and was prejudicial to the interests of the public and was therefore void.

Held further, that there was a distinction in this respect between a covenant taken by a purchaser from his vendor at the time of his purchase of the goodwill of a business and that taken by a master from his servant or an employer from his employee.

The law on the subject reviewed.

British Columbia Electric Railway Co., Ltd. *v.* Loach; (1916) A. C. 719.

Negligence—Suit for damages for injury due to—Contributory negligence of plaintiff—Liability of defendant—Condition—Continuing negligence of defendant cause of injury—Effect.

A person who is guilty of contributory negligence is not disentitled to recover damages for injury alleged to have been caused by the negligence of the defendant if the latter might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff. For the application of this rule it is not always necessary that the defendant should be guilty of a new negligence after that of the plaintiff. It is enough to make the defendant liable if the same conduct which constituted the primary negligence is repeated or continued and is the reason why he does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises.

London Association for Protection of Trade *v.* Greenlands Limited, (1916) 2 A. C. 15.

Libel—Privileged occasion—Association of traders for Mutual protection—Communication to Members.

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An unincorporated association of traders was formed with a view to making private inquiries as to the means, respectability and trustworthinerss of firm's and individuals, to enable its members to enter into business transactions with outside firms and individuals. The association did not trade for profit. The membership to the association was by a small annual subscription; and the members had to pay at certain rates for their enquiries which were made by letters addressed to the Secretary of the Association who would make private enquiries of the solvency or otherwise of the individuals and firms and communicate them to the members concerned. One K, a member wanted to enter into business transactions with G and wrote to H, the Secretary asking about the solvency of G. The Secretary made enquiry of a certain W about the solvency of G who out of malice mis-stated G's worth. This information was duly communictaed to K. On an action for libel by G against the Association, H and W express malice was found against W, damages were awarded against him and he did not appeal. As regards the liability of the association it was held, it cannot be sued as an entity in law, as it was not incorporated.

With regard to the liability of H, which was the main point of contention.

Held, that H was the agent of the individual member who makes the enquiry and not of the association, to make the inquiry about the credit; and as such the occasion was one of privilege and so he was not liable.

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Evans *v.* Edinburgh Corporation, (1916) 2 A. C. 45.

Negligence—Road obstruction—Door opening outwards on the pavement of the road—Liability of the house owner.

The plaintiff who was passing along the street was wounded by the sudden opening of a door which opened outwards on the street; on the occasion in question, it was not opened either by the house owners or anyone in their service.

In an action against the house owners for negligence, in having on their premises a door of this dangerous construction.

Held, the house owners were not liable, as having a door opening outwards upon a street did not infer negligence *per se* on their part.

This case has to be distinguished from the class of cases, where a man has premises so constructed that they may become a danger to passers by, as for example by having affixed to his premises a projecting lamp which he negligently allows to get out of repair, so that it falls on the head of a passenger, the distinction being that in the present instance, the premises in themselves and apart from their use are perfectly harmless.

King *v.* David Allen and Sons, Bill Posting, Limited. (1916) 2 A. C. 54.

License—Revocation—Licensor assigning premises to which license is attached — Assignee refusing to continue license — License not an interest in land—Right of licensee against licensor.

The defendant, the owner of certain premises entered into an agreement with the plaintiff in July 1913 by which the defendant gave permission to the plaintiff to affix bills, posters and advertisements to the flankwall at side of the picture palace to be erected on the premises for four years from November 1913 or from the day the picture house opens for business, the plaintiff to pay for such permission rent at the rate of £12 per annum and the defendant agreed not to permit any other person to affix any bill poster or advertisement for that period.

The defendant demised the premises to a picture house company which demise did not make any reference to the agreement of July and the demisee refused permission to the plaintiff to affix bills.

Held, in an action for damages by the plaintiff against the defendant the agreement did not create any easement or license coupled with a grant. The agreement being therefore purely personal, and the defendant having put it out of his power to perform the agreement of July 1913, he was liable in damages for breach of contract to the plaintiff. *Mackinthosh* v. *Dun* (1908) A.C. 390 distinguished.

Distington Hematite Iron Company, Ld., *v.* Possehl and Co. (1916) 1 K. B. 811.

Executory contract between subjects of two nations—Outbreak of war between the nations—Effect on contract—Suspension —Dissolution.

In this case the question for decision was as to the effect of an outbreak of war between two nations on an executory contract between subjects thereof. It was *held* that the contract was suspended as opposed to dissolved only where the suspension did not involve the making of a different contract between the parties and that where postponement of the performance of mutual obligations, or the cancellation of mutual obligations which fell due during the war, involved a substantial alteration of the contract itself, no such postponement could take place.

Asiatic Petroleum Company, Ld. v. Anglo Persian Oil Company, Ld. (1916) 1 K. B. 822 C. A.

Practice—Documents—Discovery—Privilege—Rule as to—Scope of—Document in possession of private person—Production prejudicial to public interest.

The rule protecting documents from discovery, on the ground that disclosure would be injurious to the public interests, is not limited to state papers, reports, minutes, and other official documents or correspondence. The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production.

The action was to recover damages for alleged breach of an agreement by the defendants to sell to the plaintiffs a cargo of crude oil. The defendants were also under contract with the Board of Admiralty for the supply of the said oil. The question arose as to whether a copy of a letter from the defendant company to their agents in Persia containing confidential information from the Board of Admiralty as to the progress of the campaign in Persia and as to the intentions of the authorities in reference thereto, was privileged from inspection on the ground that its production would be detrimental to the interests of the State. The information had been given to the defendants for the purpose of assisting them in maintaining the supply of oil and of keeping their agents properly instructed. *Held*, that, notwithstanding that the document was not a public Official document, it was privileged because its disclosure would be injurious to the public interests.

JOTTINGS AND CUTTINGS.

Where Quibbling is not popular:—Theophilus Harrington, a Vermont Judge in the early part of the last century, was a man who loved the right and cared little for mere legal quibbling. "If justice controls your verdict," he would often say to the jury, "you will not miss the general principles of the law." At one trial, when the possession of a farm was in question, the defendant offered a deed of the premises, to which the plaintiff's lawyer Daniel Chipman objected because it had no seal. "But your client sold the land, was paid for it, and signed the deed, did he not?" Asked the Judge. "That makes no difference," said Chipman, "the deed has no seal, and cannot be admitted in evidence." Is anything else the matter with the deed " asked the Judge. " I don't know that there is." "Mr. Clerk," said the Judge, "give me a wafer and a three-cornered piece of paper." The clerk obeyed, and the Judge deliberately made and affixed the seal. "There, Brother Chipman," said he, "the deed is all right now. It may be put in evidence. A man is not going to be cheated out of his farm, in this Court, when there is a whole box of wafers on the clerk's desk."—*Law Students' Journal, May 1916.*

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Appeals to the House of Lords are in future to be brought within six months from the decision of the Court of Appeal, and the special privileges hitherto allowed to infants, married women, insane persons, and prisoners are done away with. *Law Students' Journal, June 1916.*

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Mediation.—The recent utterances of the President of the United States have caused much speculation as to the relation in which he is likely to place himself towards the belligerents. It should be clearly understood that mediation, whether before or after the outbreak of hostilities, is not a purely political matter, but partly a legal one, and it is dealt with as such in detail in the Hague Conventions. The Convention for the peaceful settlement of international differences of 1899 lays down the procedure to be followed for the offer and acceptance of meditation before, and in order to avert war, and, after the outbreak of war, in order to arrive at a basis for peace. Article 1 (unhappily, a dead letter) provides for a submission of every dispute to mediation, so far as

circumstances permit. Article 2 is more important, as it imposes a positive duty. The contracting powers agree that the right to offer mediation exists for all strangers to a dispute (who are, of course, signatories of the convention), whether before or after war. It is expressly and specially stipulated that such an offer of mediation can in no way be regarded by the power or powers to whom it is offered as an unfriendly act. It is important to note this, in view of the disposition of a section of the Press to regard the mere mention of the word 'mediation as an insult to Great Britain and her Allies. Such mediation might be acceptable, or it might not; but that is quite irrelevant to the consideration whether the power that proposes mediation commits by doing so, some breach of International Law or Comity. It does nothing of this sort. President Wilson is alive to his powers and under the Hague Convention, and with the assistance of his expert legal advisers may be trusted to do whatever he intends without offending against any propriety. It may be noted that it was in virtue of this provision in the convention that President Roosevelt in 1905 mediated between Russia and Japan, and gave a basis for the negotiations that led to the Treaty of Portsmouth which ended the conflict.—*Law Journal, June 3rd, 1916.*

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Jurymen and Counsel.—Mr. Justice Lush took, we think, the only possible course in requiring the withdrawal of the juryman who accused Mr. Gordon Hewart, the leading counsel for the defendant in the Hulton case, of cross-examining the plaintiff in bullying style. Jurymen have to determine the issues of fact submitted to them; it is no part of their function to interpose comments on the manner in which a trial is being conducted. It is for the Judge to see that witnesses are treated with fairness and courtesy. Nobody who knows Mr. Gordon Hewart can believe for one moment that he was making an improper use of his right of cross-examination, and nobody who knows Mr. Justice Lush can believe that he would fail to protect a witness who was being treated in a manner unworthy of the traditions of the Bar. If individual jurymen were at liberty to comment upon the way in which cases are conducted, the most mischievous opportunities of prejudice would be introduced into trials, and the parties would be put to intolerable expense and delay through the necessity of

re-hearing. It is no more the business of a juryman to censure the action of an Advocate than it is of an Advocate to criticise the conduct of a juryman. A juryman is protected from insult. Mr. Oswald, in his well-known work on 'Contempt of Court', refers to a trial at a Quarter Sessions at which the foreman of the Jury asked some quite legitimate questions whilst the evidence was being given. 'I thank God,' exclaimed the Counsel for the prisoner when he came to address the Jury, 'that there is more than one Juryman to determine whether the prisoner stole the property with which he is charged; for there was only one, and that one the foreman, from what has transpired to-day there is no doubt what the result would be.' For this gratuitous attack upon the enquiring juror the learned gentleman, being adjudged guilty of contempt, was fined 10£ (Ex parte Pater (1864) 5 B and S 299). There are other cases, however, in which the jurymen have been made to realise that they are not beyond the disciplinary authority of the Court. Some twenty-five years ago, in the Manchester Court of Records, an impatient juror exclaimed, 'I want to know what the devil I have been brought here for,' whereupon the Judge ordered him to be taken into custody. If jurymen were permitted to regard themselves as free to indulge in gratuitous criticism of the methods of counsel—methods based on facts and rules quite unknown to their critics—this disciplinary power might have to be exercised more frequently to the detriment, perhaps, of the dignity of the Courts.—*Ibid.*

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Counsel in Treason cases.—The Casement trial has drawn attention to one or two points in connection with prosecutions for treason which are not very familiar even to Lawyers who practice at the Criminal Bar. In the first place, by an archaic anomaly prisoners accused of high treason are not entitled as of right to instruct counsel who will represent them at the actual trial, although there is no restriction on their rights in this respect as regards the preliminary investigation by Justices. This is due to the fact that at common law a prisoner indicted for felony, as opposed to misdemeanour, was not entitled to be defended by counsel. A series of statutes granted in succession various parts of this right, but the full claim to employ counsel for all purposes for which they could be employed in a civil action was

not considered until the trials for Felony Act was passed in 1836. But so long ago as 1695 the special interest felt by the public and by politicians in the case of persons accused of Treason led to the passing of the Treasons Act (7 and 8 William III, cap. 3), which provided that in such cases, where the prisoner requests the assistance of counsel, the Court shall assign him two members of the Bar, and no more, for his defence. The Court also nominates the defendant's solicitor. This procedure in the case of treason is apparently still necessary, unless the term 'Treason' is included in the term 'Felony' within the meaning of the Trials for Felony Act. The better view is that it is not, and indeed this view is covered by authority (Regina *v.* Frost, 4 State Trials N. S. 103). In the case quoted, Chief Justice Tindal after Sir Frederick Pollock and Mr. Kelly had been assigned as counsel to the Chartist Frost, refused to hear Mr. Thomas, a junior member of the Bar, who was instructed to assist them. The old practice, too, was that counsel so named by the Court, like others invited by the Bench to defend a prisoner, accepted no fees; but this rule of professional etiquette still surviving in the days of Lord Erskine was abandoned in the case of Frost, and is no longer binding on the Bar.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

In the *Law Quarterly Review* for April, 1916 Mr. H. R. Pyke discusses the law that is to be administered by Prize Courts. The British Court like every other Prize Court is a purely municipal tribunal, deriving its authority from the British State and though rules of international law constitute, as it were, the common law of that court, those rules are liable to be supplanted by the acts of the legislature. The court is bound by its previous decisions unless it can be shown that there has been a subsequent change in the law of nations to which Great Britain has expressly or impliedly given consent or unless a change is necessary to adapt established principles to altered circumstances and conditions. The writer is of opinion that orders in Council also bind the tribunal but in this his view is opposed to that of the Judicial Committee of the Privy Council in the *Zamora* case where their Lordships hold that the King in Council has no authority to prescribe or alter the law to be administered and that in this matter the position of the Crown in Prize Courts is the same as in Ordinary Courts. The writer is

of opinion that their Lordships have not allowed sufficient weight to the peculiar prerogative of the Crown in international affairs under the British constitution and to the fact that in its origin the primary function of the Prize Court was to determine the acts of the commissioned agents of the Crown for which the latter, as representing the country in foreign relations will be responsible.

Mr. P. Gide gives an account of the French Law with reference to *Foreign Married Women*. The French Civil Code mentions four kinds of Marriage Contracts. They are known respectively as the (i) "*Communante*," (ii) *Separation de biens*, (iii) *Regime de non-communante* and (iv) the dotal system. Under the first which on failure of the parties to adopt any other kind of contract is annexed to every marriage contract, all the personal property possessed by the contracting parties at the time of marriage and all the personality acquired during marriage by succession or gift unless the testator or donor has shown a contrary intention, all rents and revenues of such property and all the real property purchased during marriage becomes the assets of the community. The husband has the administration of this property which he may sell, alienate or mortgage without the consent of the wife, the wife cannot contract without the consent of the husband. He has also the administration of the wife's personal property but he cannot alienate her realty without her consent. Under the "*separation de biens*" system each party retains control over his or her own property, and each party contributes towards the expenses of the family, in the absence of any express contract, the wife's share being one-third. In the *regime de non-communante* each party retains his or her property. However, the husband administers the separate property of his wife. In the fourth system, the wife retains the property of her dowry but the husband administers it. The creditors have no right to proceed against it, the property being inalienable. Whether foreigners marrying in France are governed by the French law or their own, depends upon their intention at the time of the marriage which is to be determined as a question of fact in each case.

Mr. Norman Bentwich points out the many respects in which International law has developed during the present war with reference to the rights of belligerents and neutrals at *sea*. Some of the developments are utterly at variance with the previous concep-

tions, *e.g.* the German claim to sink merchantmen without warning but others are such as are called for by the altered circumstances, for instance a war zone, a larger right of search, &c.

The contributions of the April number of the Harvard Law Review are offered as a tribute to Mr. Justice Holmes on the occasion of his 75th birthday.

Cosmopolitan Custom and International Law is an article contributed by Sir Frederick Pollock. In this article he considers the means hitherto in use for preserving peace and their defects and suggests a new device for the purpose. For instance arbitration, he says, is effective only when the parties have already made up their minds not to fight or desire to be fortified with good reasons for not fighting. Mediation is a more elastic method than arbitration but in operation it is one degree weaker.. For it supposes, in addition to previous willingness to agree that the same will continue throughout. On the whole, mediation and the less formal equivalent known as "good offices" are more useful for smoothing the way towards a settlement than for conducting the matter to an end. Conferences of ambassadors or special delegates have often been useful in effecting a settlement after the war and in confining local wars within the original limits But they are seldom called until great mischief has already been done and no case is known where formal conference has wholly averted an impending war. Direct negotiation is obviously the best way but it assumes the existence and continuance of a genuine will to agree. Moreover it can be easily misused by a power with a view to gain time. Such being the defects of all the remedies available without actual resort to arms, is it possible to have anything like an international law? If we could find a rule in the custom of nations anything like a collective reprobation of self-redress by arms without proved failure of peaceable means, there is a possibility of the vague moral sense hardening into a legal rule. To this there is a great obstacle in the doctrine of indefeasible rights of the State which asserts that all delegation of real authority outside the State's own jurisdiction is a derogation from its independence. On the other hand, domination by one nation which is the other alterative is unthinkable. The best solution so far seems to be *Balance of power*. Sir Frederick

Pollock is for a quasi federal alliance, a league of peace and international jurisdiction by the joint and several force of the allies. It is not necessary though desirable that such a league should include all the considerable civilised powers. The league as regards all states outside it would have to be a defensive alliance. It should warrant its members against attacks from without. The members should be strictly forbidden to commit hostile acts against one another and bound to be assisting the common authority both against external aggression and against any recalcitrant member. A judicial court for *justiciable* matters and a commission of conciliation to mediate and recommend in non-justiciable cases and also a mixed committee of selection which might sift out justiciable and non-justiciable questions in any case of unusual complexity is what Mr. Taft suggested in May 1915 and this scheme recommends itself to Sir Frederick.

Montesquieu and Sociological Jurisprudence is another interesting article in which Dr. Eugene Ehrlich examines *L'Esprit des Lois* of Montesquieu with a view to correctly appraise the value of the contributions of that great writer to sociological jurisprudence. In fact, *L'Esprit des Lois* must be considered, he says, as the first attempt to fashion a sociology of law. In strict contradiction to the law of nature school, which assumes a uniform everlasting law, Montesquieu teaches that law depends on multifarious conditions and varies with these conditions. This idea marks the greatest progress effected by a single man in legal science. It must be confessed however, that we find in *L'Esprit des Lois* more hints, suggestions and materials for sociology of law than in any way an investigation thereof. But there is already the nucleus of the future science, the perception of some natural accord with law in social life. Montesquieu's work naturally suffers from some of the defects incidental to the age in which he lived. His facts are neither accurate nor sufficiently wide and comprehensive. He was wholly unaware of the modern conception of evolution and development.

Professor Wigmore contributes a paper on Justice Holmes and the Law of Torts. According to him Justice Holmes is the only Judge who has framed for himself a system of legal ideas and general truths of life and composed his opinions in harmony with the system already formed. Another trait of his opinions which add to

their fascination is his epigram instinct; another commanding thing is the philosophy of life which decorates and dignifies his technical lore of the law. His instinct for the history of the law is another notable trait. With all his learning, he has a keen sense for the practical needs in the law of the day. His familiarity with the history of the law is only a phase of his broader interest in all literatures of life. As Mr. Wigmore puts it, his generality of absorption is certainly something that the young lawyers of to-day can afford to take notice of. His opinions are literature, not merely law, classics not mere technics. The above general observations are illustrated by the writer by reference to the valuable opinions of that Judge on various questions relating to the Law of Torts.

In another paper of interest Mr. Morris Cohen says that while at one time there was need to protest against the over emphasis of the logical element in the law now it looks as if people are coming to forget there are principles at all underlying the law and points out the necessity for a clear recognition of those principles for the orderly growth of law

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BOOK REVIEWS.

THE CURRENT INDEX OF INDIAN CASES, 1915. *Published at the Law Publishing House, Madras.*

The value of this Digest of Indian cases is too well known to the legal profession to need any words of commendation from us. We should therefore only invite the attention of our readers to the publication of this volume which is a complete digest of all the cases in the Indian Reports of the year 1915.

SANJIVA RAO'S *Digest of Privy Council Rulings, Vol. II.*

This volume brings down the Privy Council cases to the end of 1912 in the body of the book and at the end of the volume is a supplement which brings the cases to the end of 1915. The lines on which this Digest proceeds are those pursued by the late Mr. Sanjiva Rao in the 1st edition of this work, which commended itself to the professions so much, that they went in largely

for the publication though there were the other Digests like Woodman's which digested the Rulings of the High Courts and the Privy Council.

THE INDIAN DECISIONS (*old series) Vol. XV.*

We gratefully acknowledge the receipt of this volume which reprints volume 12, part 2, and volume 13, part 1 of the Bengal Sudder Dewanis Adaulet Reports. We have drawn attention to the merits of the publication in reviewing the earlier volumes and we do not think it necessary to repeat them here.

The Madras Law Journal.

PART VIII.] AUGUST, 1916. [VOL. XXXI.

Palaniandi Chetty v. Appavu Chettiar.

(Avoidance of Fraudulent Transfers—Necessity for Representative Actions.)

II

In India the only reported decisions dealing with the question of the necessity for a representative action to set aside a fraudulent transfer are those in *Burjorji Dorabji Patel* v. *Dhunbai* [1], *Ishwar Timappa* v. *Devar Venkappa* [2] and *Hakim Lal* v. *Mooshahar Sahu* [3], relied upon by Coutts Trotter, J. Before dealing with them, however, it is necessary to notice the decision of the Judicial Committee in *Chatterput Singh* v. *Maharaj Bahadur* [4], which is sometimes understood to have laid down that a representative action is necessary in such cases. We venture to think with Coutts Trotter and Seshagiri Aiyar, JJ. that the observations relied upon could hardly be regarded as bearing on the present question.

The dispute in the appeal before their Lordships was between Luchmiput (represented by the defendant in the suit and the appellant before their Lordships) and Dhunput (the plaintiff in the suit represented by the respondent before their Lordships). Luchmiput and Dhunput had each a mortgage of practically the suit properties executed in his favour by the same persons, Luchmiput's mortgage being, however, the prior one. Dhunput and Chatterput, son of Luchmiput, had each sued upon his mortgage without making the other a party to his suit, obtained a decree and purchased the properties at the sale held in execution. The sale held in execution of the decree in Chatterput's suit was prior to that held in execution of the decree in Dhunput's suit and Chatterput was also put in possession of the properties purchased by him. Subsequent to the decree in his suit but before the execution sale in his favour, Chatterput had also purchased out of Court the whole equity of redemption on his mortgage. Under these circumstances, Dhunput instituted the suit,

1 (1891) I. L. R. 16 B. 1. 2. (1902) I. L. R. 27 B. 146.
3. (1907) I. L. R. 34 C. 999. 4. (1905) I. L. R. 32 C. 198. (P.C.)

out of which arose the appeal before their Lordships, against Chatterput for recovery of possession of the suit properties, and in the alternative, for redemption of the mortgage in favour of Luchmiput. The plaint alleged that the decree obtained by Chatterput was collusive and fraudulent and also that the purchases made by him were illegal, null and void on the ground of the same being collusive and fraudulent, but it stated no further particulars. The Courts below found that the proceedings in Chatterput's mortgage suit were collusive and fraudulent and that Chatterput acquired no title to the suit properties by the sales held in execution of the decree therein ; and their Lordships upheld the latter finding on the ground that at the time of the said sales Chatterput was alone represented on each side of the record. There remained the question of the title of Chatterput under his private purchases. With regard to this the Subordinate Judge suggested that the purchases were at least voidable under S. 53 of the Transfer of Property Act at the instance of Dhunput. But no issue had been raised with reference to this point and the decree of the Subordinate Judge did not contain a direction for avoiding or setting aside the transfers. In the High Court the said purchases were simply disregarded without any reasons being given for so treating them beyond a passing allusion to the view of the Subordinate Judge. In this state of things their Lordships had to consider whether the private purchases did not avail Chatterput. In holding that they did their Lordships observed that the courts below ought not to have considered the question of the validity of the same under S. 53 of the Transfer of Property Act. Lord Davey, who delivered the judgment of their Lordships, said (p. 217): "No issue was stated in this suit whether the transfers (private purchases of Chatterput) were or were not liable to be set aside at the instance of Dhunput under S. 53 of the Transfer of Property Act, and no decree has been made for setting them aside. *Such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose, and this suit was not so constituted either as to parties or otherwise.* Their Lordships do not express and have not formed any opinion whether the transfers or any of them could have been avoided *in a properly constituted suit.*" The italicised passages are those relied upon in support of the view that their Lordships have decided that a suit

to set aside a fraudulent transfer under S. 53 of the Transfer of Property Act must be a representative proceeding. Their Lordships do not expressly say so and the expressions "suit properly constituted for that purpose" and "this suit was not so constituted either as to parties or otherwise" cannot be regarded as necessarily involving that view. The plaintiff, it will be noticed, claimed to recover possession of the properties, and, in the alternative, to redeem the mortgage in favour of Luchmiput; and, in support of his position, he relied upon the execution purchase by him of the suit properties and the invalidity of the proceedings in Chatterput's suit and of the purchases by him of the suit properties. The plaint did not give particulars of the circumstances rendering the private purchases of Chatterput invalid and did not pray for their being set aside as fraudulent under S. 53. The persons from whom Chatterput purchased the equity of redemption out of court were not also made parties. In short, the plaintiff rested his case solely upon (1) his execution purchase, (2) his not being made a party to the mortgage suit of Chatterput, and (3) the invalidity of the execution sale in favour of Chatterput, and did not attack the private purchases of Chatterput as being fraudulent or pray for any relief in respect thereof. If the observations of their Lordships are considered in the light of this explanation, it would seem that all that they meant was that the suit was not so framed as to raise the question of the invalidity of the private purchases of Chatterput under S. 53 of the Transfer of Property Act—not "as to parties," because the transferors, for instance, were not before the court, nor "otherwise," because the plaint did not ask for any relief in respect of the purchases. Even if this reading of the observations is not correct, it is submitted, in view of the circumstance that the point does not appear to have been argued at the bar, (See notes of arguments in *Chatterput Singh* v. *Maharaj Bahadur* [1]) and that there is no discussion of the point in the judgment with reference to the peculiar language of S. 53 of the Transfer of Property Act, that the observations should not be considered to embody the opinion of their Lordships with reference to the present question so as to preclude the Indian courts from considering it on principle and with reference to S. 53.

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1. (1905) I. L. R. 32 C. at pp. 208 to 210.

Proceeding next to the decisions of the Indian Courts, it may be pointed out at the outset that their value as precedents in regard to cases falling to be decided under S. 53 of the Transfer of Property Act is minimised by the circumstance that one of them—*Burjorji Dorabji Patel* v. *Dhunbai* [1]—was decided with reference to the English law and not to the Transfer of Property Act, which had not then been extended to the Bombay Presidency, and that the other two—*Ishvar Timappa* v. *Devar Venkappa* [2], and *Hakim Lal* v. *Mooshahar Sahu* [3] —though purporting to be decided under S. 53, merely followed English precedents and did not consider the question with reference to the language of S. 53.

In *Burjorji Dorabji Patel* v. *Dhunbai* [1], the suit was by the executors of a judgment-creditor for a declaration that they were absolutely entitled to the suit property and that the defendants, the surviving trustee and the beneficiaries under a trust deed executed by the judgment-debtor, had no right to or interest in it. The suit was for a mere declaration because the plaintiffs were in possession of the property on the date of the suit, having obtained possession from the judgment-creditor who had purchased the property in execution of his decree and taken possession thereof. The plaintiffs also prayed for a declaration, if necessary, that the trust-deed under which the defendants claimed was fraudulent and void *as against the plaintiffs and other creditors of the judgment-debtor*. Telang, J. who tried the suit, found the trust-deed to be fraudulent but dismissed the suit on the following amongst other grounds: (1) that, under 13 Eliz. c. 5 a fraudulent settlement was valid as against the settlor and that the plaintiffs, who were the representatives of the purchaser of the right, title and interest of the settlor (the judgment-debtor) and instituted the suit in that right were not entitled to have the deed set aside as fraudulent, and (2) that the suit could not be treated as a suit in the interest of all the creditors, as the principal relief claimed was a declaration of plaintiff's title to the property and the relief claimed in respect of the deed was merely ancillary. In the Course of his judgment, however, the learned judge considered the present question (pp 19-20) and stated as his conclusion that "the only proceeding by which advantage can be taken of the provisions of 13 Eliz. c. 5 is a suit on behalf of all creditors." Now

1. (1891) I. L. R. 16 B. 1. 2. (1902) I. L. R. 27 B. 146.
3. (1907) I. L. R. 34 C. 999.

it will be seen that, in the view taken by the learned judge of the nature and scope of the suit and the right in which the plaintiffs instituted it, his observations on the present question were purely *obiter*. We have already endeavoured to show that there is no rule of law even in England requiring a representative proceeding in such cases. We may also add that, regarded as a statement of the English law, the observations of the learned judge are incomplete inasmuch as he does not notice the distinction, recognised in some of the text-books dealing with the English law on the point, between the case of a judgment-creditor and that of an ordinary creditor.

In *Ishvar Timappa* v. *Devar Venkappa* [1], the question for decision was whether a person could sue under S. 53 of the Transfer of Property Act before he had obtained a decree on the debt by virtue of which he claimed to be a creditor of the transferor. Sir Lawrence Jenkins C.J. and Batty J held that he could but add (p. 150) " while a creditor in the position of the present plaintiff is entitled to sue, *he can only do so on behalf of all other creditors of the transferor*, so that when the case goes back to be dealt with on the merits, it will be necessary for the court to bear this in mind, and require such amendments as may be necessary to bring the suit into conformity with this *rule of law*." It does not appear from the report whether the question was argued at the bar and the judgment contains no discussion of the point with reference either to English precedents or to the language of S. 53.

Hakim Lal v. *Mooshahar Sahu* [2], does not carry the matter further. The view therein taken is rested almost entirely upon *Burjorji Dorabji Patel* v. *Dhunbai* [3], *Ishvar Timappa* v. *Devar Venkappa* [4], and *Chatterput Singh* v. *Maharaj Bahadur* [5], and on what the learned judges regard as " the settled rule in England in such cases"—all of which have been fully discussed above.

It will thus be seen that there is no decision of any of the Indian Courts which has considered the question with reference to the language of S. 53 of the Transfer of Property Act and yet held that under that section a representative proceeding is necessary. We are not in a position to say whether

1. (1902) I. L. R. 27 B. 146.
2. (1907) I. L. R. 34 C. 999.
3. (1891) I. L. R. 16 B. 1.
4. (1902) I. L. R. 27 B. 146.
5. (1905) I. L. R. 32 C. 198 P. C.

or not there is in the other Presidencies a well recognised practice for a defeated creditor to bring a representative action. In this Presidency there is, so far as we are aware, no such practice (see *Narayana Pattar* v. *Viraraghavan Pattar* 1, in which, though the defendant transferee was ably represented, no objection was taken to the maintainability of the suit by the unsuccessful decree-holder on the ground that it was not a representative proceeding).

It is worthy of note that, although like the old Code of Civil Procedure, the new code has not made any provision with regard to the constitution of a suit to set aside a transfer in fraud of creditors, it has, unlike its predecessor, prescribed the form of the decree to be passed in such a suit. See Appendix D, Form No. 13. The decree declares the transfer void as *against the plaintiff and all other the creditors, if any*, of the defendant. That is, the decree contains as a matter of form a declaration on behalf of creditors generally though the existence of other creditors may not be known. It will be remembered that the above form is exactly the form of declaration made under the English Statute in similar cases. This circumstance also shows that the suit in such a case need not be a representative proceeding.

It now only remains to notice the argument of inconvenience referred to by Mookerjee and Holmwood, JJ. in *Hakim Lal* v. *Mooshahar Sahu* 2, and by Coutts Trotter, J. in the case under notice. If, on a proper interpretation of S. 53 of the Transfer of Property Act, a suit is maintainable by an individual creditor, considerations of the inconvenience likely to be caused by allowing such a suit ought not to deter the courts from doing so. But it also appears to us that the argumentum ab inconvenienti has not much force in the present instance. At least two solutions can be suggested which will obviate the inconvenience: (1) it may be held, as Seshagiri Aiyar J. does in the case under notice, that the decision in a suit brought by a creditor in his own behalf will, by virtue of Explanation VI to S. 11 of the Code of Civil Procedure, 1908, be binding on the other creditors as well; or (2) the right of any defeated creditor to sue in his own behalf may be recognised but the transferee for his own protection allowed to apply to the court to have the other creditors added as parties defen-

1. (1899) I. L. R. 23 M. 184. 2. (1907) I. L. R. 34 C. 999.

dants. There has no doubt been some difference of opinion as to the applicability of Explanation VI to S. 11 to suits not constituted in accordance with O. 1, R. 8 of the Code of Civil Procedure. But we venture to think that the balance of authority is in favour of the view that Explanation VI to S. 11 of the Code is not subject to the provisions of O. 1 R. 8 thereof. (See *Rangamma* v. *Narasimhacharyulu* [1], in which all the earlier cases are referred to.)

The second question for consideration is whether a defeated creditor can impugn a fraudulent transfer only by bringing a suit for the purpose and whether he cannot do so in any other way, say, by raising in defence the plea based on S. 53 of the Transfer of Property Act. In England, the plea based on the corresponding English Statute, 13 Eliz c. 5., has been allowed to be raised by the judgment-creditor in garnishee proceedings. See *Edmunds* v. *Edmunds* [2], the case which expressly decides the point. The observations of Williams, J. in *Vyse* v. *Brown* [3], and of Vaughan Williams, L. J. in *Glegg* v. *Bromley* [4], seem no doubt to be against this view. But, as has been already shown, in neither of those cases did the question arise for decision. Further, in the first, the point does not seem to have been even argued, and, in the second, the other members of the court did not express an opinion on the point and the Divisional Court had held otherwise. See also Smith's Leading cases, 12th Ed. Vol 1, p. 17; and 15 Halsbury's laws of England, p. 89 foot-note (*f*), where it is stated "an alienation may also be held bad on interpleader proceedings, without any action to set it aside or formal declaration that it is void." It would thus seem that in England a suit is not the only proceeding open to avoid a fraudulent conveyance.

In India the question directly arose for decision in *Subramaniya Pillai* v. *Dakshinamurthi* [5], and *Abdul Kadir* v. *Ali Mia* [6], neither of which however seems to have been brought to the notice of Coutts Trotter and Seshagiri Aiyar, JJ. In both of them, the plea based on S. 53 of the Transfer of Property Act was allowed to be raised in defence to a suit brought to enforce the fraudulent transfer. In the first case, the defendant was a person who had purchased the suit property in execution of a decree obtained by another against the transferor; in the second, the

1. (1916) 31 M. L. J. 26.
2. (1904) P. 362 at 376.
3. (1884) 13 Q. B. D. 199.
4. (1912) 3 K. B. 474 C. A.
5. (1912) 15 I. C. 193.
6. (1912) 15 C. L. J. 649.

defendant was the purchaser of the suit property in execution of a decree obtained by himself against the transferor. In the second case, the learned Judges added (though the point did not arise in the case) : "If there are more creditors and the particular creditor impleaded as a defendant stands on the same footing as other creditors, he must plead for all." The soundness of this opinion will, of course, depend upon (a) the necessity for a representative proceeding in any case—a point which has already been dealt with, and (b) the existence or non-existence of a distinction for the present purpose between a decree-holder and an ordinary creditor—a point to be presently dealt with.

Ishan Chunder Das Sarkar v. *Bishu Sirdar* [1], and *Rajani Kumar Dass* v. *Gaur Kishore Shaha* [2], and *Chidambaram Chettiar* v. *SamiAiyar* [3], are also cases in which the plea was allowed to be raised by a defendant. No doubt objection was not made in them to the competency of the plea by way of defence; but the parties were ably represented. These cases also do not appear to have been brought to the notice of Coutts Trotter and Seshagiri Aiyar, JJ.

Coming now to the decision in *Palaniandi Chetty* v. *Appavu Chettiar*[4], SeshagiriAiyar, J. holds that the transfer continues in force until it is set aside by a suit, that without first so setting it aside the creditor cannot proceed against the property transferred, and that he cannot impeach the transfer in defence to a suit brought to enforce it. The learned Judge rests his view on the broad proposition that in the case of voidable transactions the transaction continues in force until it is avoided. This is no doubt true, but the conclusion of the learned Judge rests on the assumption that the avoidance can only be by a suit brought for that purpose.

Neither S. 53 of the Transfer of Property Act, nor any other statutory provision we are aware of, requires the option of avoidance to be exercised only by means of a suit. Recourse must therefore be had to the general law governing the recission of voidable transactions to see if it can only be so exercised. Dealing with the recission of voidable contracts, Sir Frederick Pollock observes in his Principles of Contract (8th Ed, pp. 618-9). "If on the other hand the party (having the option) elects to rescind,

1. (1897) I. L. R. 24 C. 825.
2. (1908) I. L. R. 35 C. 1051.
3. (1906) I. L. R. 30 M. 6.
4. (1916) 30 M. L. J. 565.

he is to manifest that election by distinctly communicating to the other party his intention to reject the contract......One way of doing this is to institute proceedings to have the contract judicially set aside......Or if the other party is the first to sue on the contract, *the recission may be set up as a defence, and this is itself a sufficient act of recission without any prior declaration of an intention to rescind.*" The principle of the above passage—unless it is to be held inapplicable in India—is inconsistent with the assumption underlying the learned Judge's view. As for cases in this country, it must be taken to be settled, so far, at any rate, as this court is concerned, that a party to a voidable registered deed of transfer can set up the plea of its invalidity in defence to a suit brought to enforce it, and that even when his right to have it avoided by a suit has become time-barred (*Lakshmi Doss* v. *Roop Laul*) [1], see also *Ranganath Sakharam* v. *Govind Narasiv* [2]. The case of a person who is not a party to a deed but who has the option of avoiding it would appear to be an *a fortiori* one. There are several cases recognising the right of such a party to avoid otherwise than by a suit. Ss. 29 and 30 of the Guardians and Wards Act VIII of 1890 enact that a transfer by a guardian appointed under the Act of the property of his ward is *voidable at the instance of any other person affected thereby* in cases in which the permission of the court was not obtained for the transfer. It has been repeatedly held that, in a suit brought to enforce a transfer so made, it is open to the ward, who is added as a defendant, to set up the plea of its invalidity, although he had not himself sued to set it aside and that it is *sufficient if he declares his will to rescind by way of defence.* See *Sinaya Pillai* v. *Muniswami Ayyar* [3], *The Eastern Mortgage and Agency Co. Ld.* v. *Rebati Kumar Ray* [4], *and Hem Chandra Sarkar* v. *Lalit Mohan Kar* [5]. Again an alienation by a Hindu widow who had inherited the properties of her husband is not absolutely void but it is prima facie *voidable at the election of the reversionary heir.* In *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* [6], the Judicial Committee held that the reversionary heir might *treat the alienation as a nullity without the intervention of any Courts*, and their Lordships referred to the institution of a suit by him for possession as one way of showing his election.

1. (1907) I. L. R. 30 M. 169.
2. (1904) I. L. R. 28 B. 639.
3. (1899) I. L. R. 22 M. 289.
4. (1906) 3 C. L. J. 260 at 268.
5. (1912) I. L. R. 16 C. W. N. 715.
6. (1906) 34 C. 329 P. C.

Seshagiri Aiyar, J. relies upon the cases of *Mohamad Haji Zakaria* v. *Ahmad Bhai Habib Bhai* [1], and *Rajah of Ramnad* v. *Arunachellam Chettiar* [2], in support of his view. The first of the two cases does not seem to have any bearing on the present question and the reference to it is evidently a slip. As far as we can gather from the report, all that happened in that case was that the High Court declined to answer a reference made to it by the District Judge on the ground that S. 617 of the Code of Civil Procedure, 1882, under which the reference was made, did not cover a case like the one before the learned Judges. And as for *Rajah of Ramnad* v. *Arunachellam Chettiar* [2], the Court had not there to consider or decide the question with reference to a person not a party to the deed. Even with reference to a person who is himself a party to the deed, their Lordships' observations recognise his right to set up the plea in defence. See per Miller, J. at p. 601 and per Sadasivaiyar, J. at pp. 608, 609. See also *Tiruvengada Charri* v. *Seshadri Aiyangar* [3].

Seshagiri Aiyar, J. also holds that the defeated creditor cannot proceed against the conveyed estate in execution of his decree without previously setting aside the conveyance by a suit. On this point also we are not aware of any case laying down such a rule. On the other hand in *Subramaniya Pillai* v. *Dakshinamurthi* [4], already referred to, the late Mr. Justice Sundaraiyar stated it as a matter of *settled law* " that, although as between the transferor and transferee in the case of an assignment which is intended to defeat creditors, the assignor's rights must be regarded as having vested in the assignee, the creditors of the assignor are not bound by such an assignment and are entitled to attach the property assigned as being still the property of the assignor so far as the debts are concerned." The learned Judge went on to say " It is the practice for creditors to attach property fraudulently assigned away by their judgment-debtors as being still property available for the satisfaction of their debts in execution of their decrees." We have already endeavoured to show that a suit to set aside the transfer is not necessary and that the transfer may be rescinded by a declaration of the will to rescind by way of defence (as in the case of a ward under the Guardians and Wards Act) or by commencing an action to recover possession of the

1. (1901) I. L. R. 25 B. 327.
2. (1913) 24 M. L. J. 592.
3. (1916) 30 M. L. J. 559.
4. (1912) 15 I. C. 193.

property affected (as in the case of a reversionary heir). We have also tried to show that the recission may be made without the intervention of any courts. It would then seem to follow that, in the case of a fraudulent transfer, the creditor may show his election by proceeding against the conveyed property in execution of his decree and that for that purpose he might treat the transfer as if it had not been made. This seems to be the view even in England where the conveyance is held to be perfectly valid *except to the extent to which it may be necessary to deal with the conveyed estate for satisfying the claims of the defeated creditors.* To that extent, but to that only, the conveyance is *treated as if it had not been made.* See Story's Equity Jurisprudence, 1st English Ed. para. 371; 15 Halsbury's Laws of England, p. 90; and Kerr on Fraud and Mistake, 4th Ed., p. 101. The same view is also clearly expressed by Stirling, J. in *In re Mouat* [1] "The assignments (fraudulent assignments) became void the moment the creditors claimed to treat them as such; and thereupon the property which was comprised in those assignments ceased, as against the creditors, to be the property of the assignee, and became assets for the payment of the creditors in such a way that they had a legal right to be paid out of those assets."

Vyse v. *Brown* [2] and *Clegg* v. *Bromley*[3] relied upon by Seshagiri Aiyar, J. in support of his view to the contrary do not consider the present question. The first case turned upon the construction of S. 61 of the Common Law Procedure Act, 1854, and the question whether a formal setting aside of a fraudulent conveyance was necessary was not argued or considered. The second case also does not consider the present question. The observations of Vaughan Williams, L. J. at p. 484 that the judgment-creditor could not in garnishee proceedings impeach a fraudulent assignment made by his judgment-debtor cannot be relied upon as bearing upon the question because they were rested only on the ground that in such proceedings the judgment-creditor stood exactly in the shoes of his judgment-debtor and as the latter could not impeach the assignment so also could not the former. Whether these observations correctly represent the present state of the law even in England is far from clear. See *Edmunds* v. *Edmunds.* [4] which does not appear to have been referred to in

1. (1899) 1 Ch. 831 at 834-5.
2. (1884) 13 Q. B. D. 199.
3. (1912) 3 K. B. 474 C. A.
4. (1904) P. 362 (376).

Clegg v. *Bromley* [1]. Before leaving this question, we may also point out that Coutts-Trotter, J. takes it that the property can be attached in execution and that a judgment-creditor who has so attached can set up the plea of fraudulent transfer in defence. The reason of the suggested distinction between a judgment-creditor who has attached the property and one who has not is not easy to perceive. We shall however advert to this point presently.

The third and the last question for consideration is whether there is, for the purpose of the present discussion, any distinction between the case of a judgment-creditor and that of an ordinary creditor. Seshagiri Aiyar, J., holds that there is none in India, whether or not there is any in England, at any rate, after the Judicature Act. The learned Judge assigns two reasons for his view (1) that S. 53 of the Transfer of Property Act does not make any distinction between the two cases and (2) that the position of a judgment-creditor in England is altogether different from his position in India. Coutts-Trotter, J. also seems to be of opinion that a judgment-creditor is not as such in a better position than an ordinary creditor. But the learned Judge seems to think that a judgment-creditor who has attached properties of his judgment-debtor in execution is in a better position. Though both the learned Judges are agreed in holding that there is no distinction between an ordinary creditor and a judgment-creditor as such, some passages in Halsbury's Laws of England and in May's Book seem to suggest a distinction even as between them in England. (See 15 Halsbury's Laws of England, p. 89 already referred to and pp. 311 and 315 of May's Book); and the case of *Abdul Kadir* v. *Alia Mia* [2] seems to recognise the existence of the disdinction in this country. *Smith* v. *Hurst* [3], *Spirett* v. *Willows* [4], *Neale* v. *Day* [5], and *Blenkinsopp* v. *Blenkinsopp* [6] are the only cases cited in the passages above referred to in support of the alleged distinction and we have not been able to find any other case in which the distinction is pointed out or recognised. When the said cases are examined, it appears, however, that in none of them was the point argued at the bar or considered in the judgment. In each of them, the plaintiff was no doubt a judgment-creditor and the decree declared the conveyance void, as against him.

1. (1912) 3 K. B. 474 C. A.
2. (1912) 15 C. L. J. 649.
3. (1852) 68 E. R. 826.
4. (1865) 46 E. R. 649.
5. (1858) 28 L. J. Ch. 45.
6. (1852) 42 E. R. 644.

In *Spirett* v. *Willows* [1], the plaintiff was also the sole creditor and had besides been appointed a creditor's assignee in the bankruptcy proceedings instituted by him against the judgment-debtor. It seems to us to be unsafe to deduce any rule from the facts of those cases because we find other cases in which even a judgment-creditor prayed for relief on behalf of other creditors also. *See*, for instance, *Neale* v. *Day* [2], and the decree in a suit by a judgment-creditor declared the conveyance in question void as against him and other creditors. See, for instance, *Bott* v. *Smith* [3].

But whatever may be the law or practice in England, it seems to us that there is no warrant for introducing such a distinction in India. S. 53 of the Transfer of Property Act does not recognise it and a judgment-creditor is not as such in any better position in this country than an ordinary creditor. With great respect to the learned Judges who decided the case of *Abdul Kadir* v. *Ali Mia* [4], we therefore think that their decision on this point is open to doubt. It may be stated that the learned Judges merely followed what they thought was the English Law on the point.

Proceeding to the suggested distinction between a judgment-creditor who has attached and one who has not, we find that Coutts-Trotter, J., relies on what his Lordship regards as the principle of the decisions in *Smith* v. *Hurst* [5], and *Neate* v. *The Duke of Marlborough* [6]. The learned Judge likens the remedy sought by a judgment-creditor in this country to the "remedy by way of executable execution in aid of the legal right given by the Judgment" in England and states that, as in England a judgment-creditor could not invoke the equitable relief until he had followed up his judgment by suing out a writ of *Fi fa* or *Elegit* as the case might be, it must be held "that the mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor; and therefore he must follow up his judgment by attaching the properties in order to enable him to utilise S. 53 in answer to a claim founded on the impeached deed of transfer." With reference to the two cases relied upon by the learned Judge it may be pointed out at

1. (1865) 46 E. R. 649.
2. (1858) 28 L. J. Ch. 45.
3. (1857) 52 E. R. 957.
4. (1912) 15 C. L. J. 649.
5. (1859) 68 E. R. 826.
6. 40 E. R. 983.

the outset that in neither of them was the judgment-creditor a defendant and the question whether he could impeach the conveyance as a defendant considered. In *Smith* v. *Hurst* [1], which merely followed *Neate* v. *The Duke of Marlborough* [2] the judgment-creditor was the plaintiff and he instituted the proceeding in the Court of Chancery to set aside a fraudulent deed executed by his judgment-debtor. He alleged in his plaint that the writ of *Fi fa* sued out by him had not been returned and admitted that he had not sued out a writ of *Elegit*. On those facts Turner, V. C., held that, as the plaintiff had not proceeded at law to the extent necessary to give him a complete title, in the particular case, by suing out the writ of *Elegit*, the Court of Chancery, which merely acted in aid of the legal right, could not give the plaintiff any relief as against the freehold estate comprised in the assignment in question. Relief was, however, given as regards the leasehold and personal estate.

It will be seen that the decision in *Smith* v. *Hurst* [1] turned upon the difference between the jurisdictions of Courts of Law and of Equity in England and upon the peculiar efficacy of the writs of *Fi fa* and *Elegit*. It will also be seen that even in that matter, a difference was made between leasehold and personal estates and freehold estates. In India, on the other hand, the same courts are Courts of Law and of Equity and attachment in execution does not give the attaching creditor any lien on the property attached such as a judgment-creditor in England obtained by suing out the writ of Elegit. (As to the effect of attachment in execution in India, see *Raghunath Das* v. *Sundar Das* [3]). Further, the position of a judgment-creditor in India is, as is pointed out by Seshagiri Aiyar, J., altogether different from his position in England. With great respect to Coutts-Trotter, J., we think that the principle of *Smith* v. *Hurst* [1] and *Neate* v. *The Duke of Marlborough* [2] can have no application in India.

If the correct view is that a creditor is entitled, as a matter of substantive right, to proceed againt properties fraudulently assigned away by his judgment-debtor without first having the assignment set aside by a suit brought for the purpose, the further question arises whether, either in the claim proceedings or in the suit

1. (1852) 68 E. R. 826. 2. 40 E. R. 983.
3. (1915) 42 C. 72. (P. C.)

under O. 21 R. 63 of the Code arising therefrom, the Court can go into the question of the validity of the alienation under S. 53 of the Transfer of Property Act.

In *Subramania Pillai* v. *Dakshinamurthi*,[1] Sundara Aiyar, J. observed that the practice was for the assignee to put in a claim petition and for the executing court to go into the question of the validity of the transfer under S. 53 of the Transfer of Property Act. The learned Judge was of opinion that the question of title could be determined both in the claim proceeding and in the suit under O. 21, R. 63. And his view as to the scope of the claim provisions of the Code seems to be the prevailing view, at any rate, in this Presidency. See *Ramu Aiyar* v. *Palaniappa Chetty* [2] decided by White, C. J. and Ayling, J.

But even if the claim provisions are held to be confined to the determination of the question of physical possession, if the executing court goes into the question of title and makes an order allowing or disallowing the claim, it would seem that the order is conclusive unless a suit is filed by the claimant as provided by O. 21 R. 63. See *Bhagwan Das* v. *Raj Nath* [3].

Even if the claim provisions are held to be limited to the determination of the question of physical possession, there is no reason whatever for limiting the scope of the suit under O. 21 R. 63 in the same way. The Rule speaks of the suit as one "*to establish the right* which he (the defeated party) claims to the property in dispute". The expression "establish the right" seems *prima facie* to be comprehensive enough to cover a determination of the title to the property in dispute; and the decisions in *Subramania Pillai* v. *Dakshinamurti* [1]; *Ramu Aiyar* v. *Palaniappa Chetti* [2]; *Sadu Bin Raghu* v. *Ram Bin Govind* [4]; *Narayana Pattar* v. *Viraraghavan Pattar* [5]; *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* [6]; and *Bibi Aliman* v. *Dakeshwar Pershad* [7] all proceed upon the assumption that the question can be gone into in the suit under S. 283 of the old code or O. 21 R. 63 of the present one. In *Bibi Aliman* v. *Dakeshwar Pershad* [7], the learned Judges observe. "The object of such a suit is not to have the order in the claim proceeding set aside, as would appear to have been thought in some of

1. (1912) 15 I. C. 193.
2. (1910) I. L. R. 35 M. 35 at 38.
3. (1912) I. L. R. 34 A. 365.
4. (1891) I. L. R. 16 B. 608, 614-5.
5. (1899) I. L. R. 23 M. 184
6. (1897) I. L. R. 24 C. 825.
7. (1904) 1 C.L. J. 296 at 299.

the cases to which reference is made later on, but to have the right of the claimant in the property established." In fact, with the exception of the case of *Abdul Kadir* v. *Ali Mia* [1], to be presently noticed, we have not been able to find any case in which the scope of the suit under O. 21 R. 63 is narrowed to the determination of the question of physical possession of the property attached on the date of its attachment.

In thus confining the scope of the suit under O. 21 R. 63, the learned Judges who decided the case of *Abdul Kadir* v. *Ali Mia* [1] purported to follow the decision of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* [2]. They thought that, in the case cited, the Privy Council had decided that the scope of a suit under S. 283 of the old code was the same as the scope of the claim proceeding and felt themselves compelled to hold that, unless there was anything in the pleadings outside the scope of S. 283 to restrain or restrict such a result, the suit under that section ought to be decided with reference to the finding as to the possession of the judgment-debtor at the time of the attachment. In this connection it may be pointed out that there are some decisions of our High Court which hold, though with reference to other matters, that the suit under O. 21, R. 63 is a form of appeal from the order in the claim proceedings and is not in its essence an original action. See *Krishnappa Chetty* v. *Abdul Kadar Saheb* [3] and *Veera Pannadi* v. *Karuppa Pannadi* [4].

With great respect to the learned Judges who decided the above cases, we venture to think that the scope of the suit under O. 21 R. 63 is wider than that of the claim proceeding and that though, for the purpose of the question which had to be decided by the Judicial Committee, their Lordships spoke of the suit as "a form of appeal," they did not lay down, and did not intend to lay down, that the suit was not an original action in the literal sense of the expression. As is well-known, the only question which arose for decision, and which was decided, in *Phul Kumari* v. *Ghanshyam Misra* [2] was as to the court-fee payable on the plaint in a suit brought under O. 21 R. 63. The plaint in the suit, which gave rise to the appeal before their Lordships, prayed for (*a*) a declaration of the plaintiff's title to the suit property; (*b*) a declaration that it was

1. (1912) 15 C. L. J. 649.
2. (1907) I. L. R. 35 C. 202 (P.C.)
3. (1914) 26 M. L. J. 449 (456).
4. (1909) 6 M. L. T. 154.

not liable to be attached and sold in execution of the attaching decree-holder's decree and (c) a permanent injunction restraining the attaching decree-holder from executing his decree against the suit properties. The plaintiff paid a court-fee of Rs. 10 for her prayer for a declaration and another fee of Rs. 10 for her prayer for a permanent injunction. Both the Courts below held that Court fee was payable on the amount of the attaching decree-holder's decree and dismissed the suit on plaintiff's default to make up the deficiency within the time allowed. Before their Lordships, the contention on behalf of the plaintiff was that Article 17 of Schedule II of the Court Fees Act applied to the case and a fee of Rs. 10 only was payable. Their Lordships upheld that contention. In doing so, they considered "*the object and the nature of the suit.*" They held that the nature of the suit was that referred to in S. 283 of the old code and its effect was to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent within the meaning of Article 17. They thought that the suit was "for review of a summary decision" and that it was "simply a form of appeal" not "unrelated" to the summary order forming the cause of action. It will be noticed that their Lordships had not to consider, and did not consider, the "scope of the suit" under S. 283 and that the point was not even argued at the bar. Under those circumstances, it seems to us to be altogether unsafe to draw any inference with reference to the question of the scope of the suit from such stray expressions used by their Lordships when dealing with an entirely different point.

A. S. VISVANATHA AIYAR.

SUMMARY OF ENGLISH CASES.

In re **Fire-proof Doors, Limited: Umney *v.* The Company:** (1916) 2 Ch. 142.

Company—Directors—Meeting—Parol evidence of what took place at—Admissibility.

The minutes of a meeting are not exclusive evidence of what took place at it. An unrecorded resolution may be proved *aliunde.*

British Union and National Insurance Company *v.* Rawson: (1916) 2 Ch. 152.

Assignment—Validity—Right of indemnity—Assignment to principal creditors.

An assignment of an indemnity, where the guarantor is interested in seeing that the principal moneys are properly applied in payment of the principal creditor, is valid at any rate, where the assignment is made to the principal creditor.

Where a company recovered judgment against a married woman in respect of a liability against which the defendant had indemnified her and the married woman assigned her right of indemnity to the company, *held* that the assignment was valid.

Silcocks *v.* Silcocks: (1916) 2 Ch. 161.

Will—Construction—Devise to A and "his male heir for ever"—Effect—Rule in Shelley's case.

Held, that a devise to A "and his male heir for ever" conferred upon A an estate in tail male and not an estate in fee simple.

There is a distinction between the expressions "heir male" and "male heir" where those words follow on a gift to the ancestor.

Puddephatt *v.* Leith (No. 2): (1916) 2 Ch. 168.

Practice—Set-off—Allowance of—Existence of Solicitor's lien—Absence of collusion between parties—Effect.

Prima facie a set-off should not, owing to the existence of a Solicitor's lien be refused if as between the parties to the action themselves it would be fair and just to allow it and if no fraud or imposition has been practised upon the solicitor by collusion between them.

Perry v. Suffield, Limited. (1916) 2 Ch. 187 C. A.

Contract—Completion—Letters of offer and acceptance containing all terms—Variation of contract by subsequent correspondence—Permissibility—Suit for specific performance of contract—Maintainability.

Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed upon between the parties at the date of the offer and acceptance, the complete contract thus arrived at cannot be affected by subsequent negotiation. when once it is shewn that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at.

Mere arrangements which in the ordinary course of business are left to the legal advisers to settle, such as the date for completion and the payment of a deposit, are subsequent matters which do not prevent the letters of offer and acceptance constituting a completed agreement.

JOTTINGS AND CUTTINGS.

Peers and the Bar.—The death of the Lord Clifford of Chudleigh has recalled very inaccurately in some quarters—an interesting controversy as to the right of a peer to practise as a barrister. 'Lord Clifford before joining the Army, intended' we are told, 'to adopt the Bar as profession, but Lord Chief Justice Coleridge refused to call him, on the ground that a peer of the realm could not be allowed to practise. This short statement contains two vital inaccuracies. The late Lord Coleridge was never in a position to refuse to any Bar student, the power of calling to the Bar belonging of course to the Benchers of the Inns. So far from it being true that Lord Clifford was refused admission to the Bar, he was called at the Middle Temple in 1882, two years after he succeeded to the Barony. What the late Lord Coleridge appears to have done is to express the view that a peer, though a member of the Bar, was not entitled to practise,

and that view was authoritatively held to be unsound when the present Lord Coleridge, on succeeding to his title, desired to continue his practice at the Bar. Sir John Rigby, who as Attorney-General, was consulted by Lord Coleridge on the matter, expressed the opinion not only that there was no legal bar to a peer practising in the Courts, but also that there was no objection on the score of professional etiquette to such a course. The opinion expressed by Sir John Rigby in 1894 received the sanction of the late Lord Esher in 1897. On his retirement from the Bench he delivered a valedictory address to the Bar, in which he implied that though a peer, he was entitled to return, if he chose, to practise at the Bar. And this view has since been supported in practical fashion. Earl Russell was called to the Bar at Gray's Inn in 1905, and no question has ever been raised as to his right to practise. The view that a peer could not practise at the Bar was based on the ground that he was qualified as a member of the House of Lords, to take part in the judicial proceedings of the House. It is true that in the famous case of *Bradlaugh* v. *Clarke* which excited so many emotions with which legal considerations had no concern, the late Lord Denman voted with the minority of the Law Lords before whom the appeal was argued. There are, two, several older cases in which lay peers have taken part in the proceedings of the final Court of Appeal. In Grenville's Journals for instance, it is stated that in *Small* v. *Attwood* (1838) the fifth vote was given by Lord Devon, who had never held judicial office. But the judicial work of the House of Lords has now come to be regarded as exclusively within the sphere of the Law Lords, and there is no more reason for prohibiting a peer from practising at the Bar because technically he is a member of the Highest Appellate Court than there is for excluding a member of the Privy Council because he too belongs to a body which has judicial functions to perform.

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The Attorney General and Ignorantia Juris.—The Lord Chancellor in 'Iolanthi'—one of the most delightful of all Gilbertian creations—sings :—

The Law is the true embodiment
Of every thing that is excellent;
It has no kind of fault or flaw,
And I, my Lords, embody the Law.

Though the Attorney-General, belonging to a lower grade of the legal hierarchy, is not to be regarded as embodying the law with the impressive fullness that the Lord Chancellor does, yet there is a fine Gilbertian touch about the discovery made in connection with the Re-election of Ministers Bill, that Sir Frederick Smith broke the law in not submitting himself to his constituents on his appointment as first Law Officer of the Crown and had rendered himself liable through this oversight to penalties amounting to the handsome sum of 18,000 pounds. *Ignorantia Juris non excusat.* The familiar saying is true of Attorney-Generals no less than of less important mortals ; but the House of Commons, not unaccustomed to generosity in such matters relieved Sir Frederick Smith of the heavy penalties which, if only the common informer had set to work before Parliament intervened, he might have been required to pay. To complete the Gilbertian character of the business, the second reading of the re-election of Ministers Bill, which, in addition to avoiding the necessity for the re-election of Mr. Lloyd George and Mr. Montagu, provided an indemnity for Sir Frederick Smith, was passed after a division in which the 'Noes' were represented by no notes save those of the two letters. Hardly less piquant than the predicament of the Attorney-General was a reminiscence which Sir Edward Carson contributed to the discussion : "I myself," he said, "was once solemnly offered by the Lord Chancellor, when I was a Law Officer, a judicial appointment for which I was not qualified, and for which I did not know that I was not qualified. The Office, presumably, was that of President of Probate, Divorce and Admiralty Division, for which, only Barristers of fifteen years' standing are eligible, while qualifying period for an ordinary High Court judgeship is ten years. So that, Lord Chancellors as well as Attorney-Generals, may be guilty of Homeric nods. Such harmless inadvertences, like the curious omission in some distinguished Judges' wills, if they afford laughter, the gods, show a gratified world that the Bench has humanity enough to err."

* * *

The Punishment for Treason :—To discuss Casement's appeal now would be academic ; but the question of execution is more practical. The penalty for High Treason is capital punishment, and the sentence of the trial court was hanging, in the usual

form. But, there is something exceptional in the carrying out of this sentence now, inasmuch as the Statute providing for executions by hanging being private (31 Vict. C. 24) specially declares that, except in cases of murder, judgment of death shall be carried into effect as if this Act had not been passed! Must there, then, be a public hanging of the traitor at Pentonville? We doubt whether, this is necessary, however fitting the punishment. The resources of civilisation, which might be shocked by such an exhibition, are not exchanged by the Act of 1868. The Royal prerogative may still be used to soften the penalty, and if authority for this is required it may be found in Lord Coke himself—so much derided by Casement's defenders—who said that 'an execution totally varying from the judgment, is illegal because the King cannot alter the judgment, though he may by his prerogative remit one part and leave the offender open to the other; as in the case of high treason, decapitation being part of the judgment, the law is satisfied, the judgment is substantially executed, if that be done, though every other part is omitted.' So in *Lady Lisle's case* the King altered the sentence from burning to beheading—women were liable to be burnt for treason till 1790—upon precedents offered to him by the Judges, who wrote: 'That execution may vary from the judgment (see the Register to 165)*; in felony where the judgment is always *suspendator per collum* yet the party may be beheaded, which is no part of the sentence.' This last dictum raises the further question whether casement might not legally be shot instead of hanged and it is noted that under the defence of the Realm Act a Civil Court may substitute shooting for hanging. But that is a matter which may well be left to the Executive, for the public conscience will not be much affected so long as the arch-traitor is not allowed to escape the fate which has been accorded to many who may only have his dupes in the Siin Fien rising—

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The Attorney's Soliloquy—With Apologies to the Bard of Avon).

To quote, or not to quote; 'tis often questioned
Whether 'tis better to embellish pleadings
With borrowed words of true euphonic merit,
Or speak plain truths in prosy words of wisdom,
And, speaking thus, prove tiresome.

To dull; to drug—with words,
And in this stupor, credulous,
Our clients may believe our word is law.
But why thus stupefy? Let us speak words
And thoughts of high intent; and let them be
The words first used by sage's long since dead.
The fact that they've endured the test of time
But proves their worth; there's great support
In calling to our aid these marvelous thoughts.
Who could resist such pleas as Portia made,
The words of Cicero, or Henry Clay?
A Judge, or Jury, ev'n could but agree
With arguments of law so reinforced.
Mere jurisprudence and the Civil Code
Are cold as glittering steel or lifeless clay;
A soulless thing; man needs the human touch;
That spark divine which renders all men kin;
The love which doth make brothers of us all.
This may result from rhetoric, not from law,
And ne'er if found in Blackstone's musty tomes.

So why not mollify what law dictates
With epigrams familiar to all men?
Enforce where need be, ridicule, retort,
Or strike the chords of sympathy, sincere
And thus t' apply the wisdom of the world,
To bring about the verdict so desired,
Is but a trick of memory, and the tongue,
Pleasing and forceful; therefore, 'tis no wrong.

M. A. W., in the Docket.

CONTEMPORARY LEGAL LITERATURE.

In the May number of the Harvard Law Review, we have this interesting statement from Mr. J. S. Ewart, the well known American writer "of waiver," all I know (or rather believe) is that, apart from what the old books tell us about a pursued thief throwing away the stolen goods, every case of waiver may be put

under one or other of four headings—Election, Estoppel, Contract and Release. Waiver in insurance cases is sometimes estoppel but almost always election. When you waive "a protest of a note that is contract. When you waive a clause in a contract that is either a new contract or estoppel. When you waive a right of action that is release or contract or nothing at all." Mr. Percy Bordwell continues his historical study "Property in Chattels."

Mr. Ezra Ripley Thayer discusses the question of *Liability without fault* laid down by *Rylands* v. *Fletcher*. The writer points out that the theory of *Rylands* v. *Fletcher* is not that suggested by Workman's Compensation Act that full responsibility is to be thrown on the undertaker for harm arising from his enterprise for it has been now settled that even in cases governed by *Rylands* v. *Fletcher* a party is not liable for the act of God or of a third party.

In good many cases to which *Rylands* v. *Fletcher* would *prima facie* be applicable, there is a competing theory which is worked, viz. the doctrine of non-delegable duty for care according to which in certain dangerous enterprises a person is liable for the consequence of even an independent contractor's negligence. Another writer Mr. Cook tries to demonstrate that even before the statutory changes in the law relating to the assignability of choses in action, they were *in substance* assignable and after assignment the assignee was clothed with all the indicia of ownership except the one of being able to sue in his own name. The assignor could not receive payments, or otherwise deal with them so as to prejudice the assignee.

An article in the American *Law Review* for May and June deals with constructive contempt that is to say not contempt of the Court directly and in its presence but a disobedience to its orders or an interference with its execution. Contempt was both a criminal offence which was punishable in Criminal Courts and a Civil matter permitting *purging* by an affidavit. There was a difference in the dealing with contempt by the Common Law Courts and the Equity Courts and there was also a difference between the higher Courts and the inferior Courts which latter were not Courts of record and had no power to summarily punish contempts of their authority. In their origin, the contempt

proceedings arose out of the contempt of the King involved in the acts complained of, who was deemed to be present in the Higher Courts.

In the Canadian *Law Times* for May, an address by Mr. Justice Beck of Alberta, is printed in which a plea is put in for more Judges made and less statutory law. He commends the rule of interpretation enacted by the Canadian Legislature that the law shall be considered as always speaking and "that whenever any matter or thing is expressed in the present tense the sense shall be applied to the circumstances as they arise so that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning." The souls of the Hindu Commentators of the smritis must surely rejoice at this turn that the law is taking in the West.

To the *Law Quarterly Review* for July, Viscount Bryce contributes an appreciation of Sir Kenelm Digby, well-known to students as the author of the History of the Law of Real Property. An incident is related by the Viscount with reference to him which shows the influence which political consideration have in the selection of officers even to purely legal appointments. In 1878, he was on the eve of being appointed to an important legal post in the public service when the action of the minister in whose hands the post lay was suddenly arrested by the friends of another aspirant. They represented that Mr. Digby however otherwise qualified was a liberal and therefore ought not to be appointed. The appointment was postponed pending the return of Lord Beaconsfield from the Congress of Berlin. When he returned the matter was submitted to him and according to the story current at the time, he simply inquired, What are the political opinions of the candidates? And when told that Digby was a Liberal, replied forthwith "how can you doubt. The other man must have it. Mr. Walter Hussey Griffith combats the view taken by the Court of Appeal in *Norman* v. *Great Western Railway Company* [1] as to the duty of Railway Companies towards persons that come on business into their premises. The view taken in the case is that the duty of the Company does not differ in nature from that of an ordinary invitor towards a person coming on invitation. According to Buckley, L. J., in both cases, it is a duty to take reasonable

1. (1915) 1 K. B. 584.

care that their premises are reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. The other two Lord Justices would substitute "unexpected" for unusual in the famous statement of the rule by Willes, J. in *Indermaur* v. *Dames* [1] *viz.*, that he (that is the visitor) using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know." The writer thinks in the first place that the duty of the company is not the same as that of an ordinary writer and in the second place he thinks that Buckley, L. J. puts that duty too high while the other two Lords Justices put it too low, while all along they are under the impression that they are not altering the law as laid down in *Indermaur* v. *Dames* [1].

Mr. C. A. Hereschoff Bartlett combats the prevalent error as to the powers of the President in the French Republic. He is not, as is often represented, a mere decorative piece of state furniture, without power, without freedom of movement, dependent on the ever changing fancy of the Parliament. On the other hand, he possesses much wider powers than the President of the United States of America. While the latter has only the power to adjourn the House when the two Chambers disagree, the former can exercise the royal prerogative of dissolving the Chamber of Deputies on the advice of the Senate before the expiration of the legal term and of adjourning both the Chambers for the period of a month twice during the same session. Again, while the President of the United States can only recommend to the consideration of the Congress such measures as he deems necessary or expedient, the French President can concurrently with the two houses initiate laws. He, of his own authority, can make laws for the Colonies, except of course where the legislature has intervened. The French method of legislation, of delegating to the executive the duty of filling in the details of the statutes enacted, give the President large powers of legislation even in cases where the legislature has interfered.

1. L. R. I. C. P. 274.

He has the disposal of armed forces in time of war and can take command of the troops in person. He has the sole right of pardon but not to grant amnesty which can only be done by a statute. Above all, he has the power of negotiating and ratifying treaties. Some of the most important treaties are of this description.

Mr. Courtney Kinney gives an interesting account of *tips* in modern life of the different kinds of them accounts of *tips* in modern life, the courtesy *tip* and the commercial *tip* and the society *tip*. These *tips* provoked the ire of the great German Jurist Hering who has written a pamphlet denouncing them.

BOOK REVIEWS.

THE PROVINCIAL SMALL CAUSES COURTS ACT, 1887. *By M. M. Shafi, II. Edition by M. M. Rafi, Lahore (1916).*

The Provincial Small Causes Courts Act is an enactment of constant use and reference both in the mofussil and the Presidency Towns; and the book under review written by a distinguished lawyer and advocate of the Punjab Chief Court and carefully revised and brought up to the end of June 1916 by the present editor is bound to be of invaluable assistance both to the bench and the bar. For the exhaustiveness of treatment and the collection of cases judiciously under appropriate headings, Mr. Shafi's book has not been equalled, so far as we are aware, by any published commentary on the Act. To enable the reader to fully understand and appreciate the provisions of the Act, reference is made whenever necessary to the provisions of other enactments. To facilitate ready reference to the sections and Article of the schedule of the Act, the bare text of the Act is given at the commencement of the book. There are also five appendices to the work setting out the statement of the objects and reasons, the report of the Select Committee, the abstract of the proceedings in the Legislative Council, a table of *ad valorem* fees liviable in suits and,

the Mofussil Small Causes Courts Act of 1865. We have carefully gone through some portions of the book and we can confidently recommend it as a useful addition to a lawyer's library.

THE CURRENT STATUTES, 1915. *Published by the Law Printing House, Madras.*

This is the third year of this useful publication. The object of the publication is to bring within easy reach of all lawyers, a collection of the parliamentary enactments and orders in Council relating to India, the Acts passed by the Imperial and Local Legislatures, in India and the important notifications rules and orders made under them.

The work is divided into two portions A and B. Part A. gives the enactments of the various legislaturers and B, the rules and notifications under the various Acts. The publication is further rendered more useful by prefixing to the body of each Act, a short statement of its objects and reasons. A work of this kind every year embodying the legislative progress of this country during the year is indispensable to all lawyers.

SUPPLEMENT TO THE COMMENTARIES IN THE ESTATES LAND ACT, SECOND EDITION, *By P. Duraiswami Aiyangar, 1916.*

We are in receipt of Mr. Duraiswami Aiyangar's supplement to his valuable commentaries on the Estates Land Act. Though the idea of publishing supplements to legal publication does not usually commend itself to us, it is not without its advantages in the case of an enactment such as the Madras Estates Land Act. The Act has been in force only from 1909 but the number of decisions under the Act, each year, has been such as to justify the publication of an annotated edition of the Act every year. Under such exceptional circumstances, we should welcome the supplement under review which brings up-to-date all the decided cases includ-

ing the decisions of the Board of Revenue and the notifications issued by the Government.

THE INDIAN DECISIONS, (*Old series*) *Vol. 16* (*Law Printing House*).

We have great pleasure in announcing the publication of the 16th Volume of the series which reprints part II of Volume XIII Sudder Dewany Adaulat Reports, pages 953—1965. This volume fully maintains the high level of excellence in the printing and get-up of the Law Printing House Publications.

THE INDIAN COURT FEES AND SUITS VALUATION ACT, *by Ram Kishan, Pleader, Chief Court, Punjab, Lahore. Edition 1916.*

An annotated Edition of the Court Fees and Suits Valuation Acts brought up to date is a necessary requisite for every practitioner. Ram Kishan's book brings the references to decided cases down to the end of March 1916. The cases are arranged under appropriate headings under each article of the Schedule. There is also a historical introduction to the Court Fees Act which is valuable as setting forth the pre-existing law relating to Court Fees in India, and define the proper scope of the Act in relation to the Suits Valuation Act. The appendices to the work give the Rules and Notifications on the subject by the Government of India, the Punjab Government and the Punjab Chief Court. The book will therefore be particularly useful to practitioners in the Punjab. The indexes to the volume are full and cross references are given wherever required.

SANJIVA RAO'S *All India Civil Court Manual, Imperial Acts, Vol. II, Third Edition, 1916.*

Sanjiva Row's All India Civil Court Manual is so well known to the legal profession that we need not say many words to commend it to them. The outstanding features of the present edition are that in addition to giving all the enactments down to the date of its publication, the footnotes give the cases decided under each section till a very recent date. By having a copy of this Civil Court Manual the legal practitioner is saved from referring to the Digests at every step; and its use is invaluable in the case of out of the way Acts for which commentaries are not available. The get-up of the volume is we need hardly say excellent and will stand the constant use to which a busy practitioner is likely to subject it. At the opening of the volume, is given a table of contents of each of the Acts; and at the end of the volume is a copious index which will be particularly useful to practitioners.

PROVINCIAL INSOLVENCY ACT. *With Commentaries by R. J. Thakor, Pleader, Ahmedabad, 1916. Butterworth & Co., Ltd., Calcutta. Price Rs. 3-8-0.*

We are in receipt of a commentary on the Provincial Insolvency Act by Mr. Thakor, Pleader, Ahmedabad. At the opening of the volume, the author gives in the introduction a short history of the law of Insolvency in the moffusil under the various Codes of Civil Procedure commencing from the one of 1859; the introduction winds up by giving a connected idea of the sections of the Act commented on. Another feature of the volume under review is that there are 3 appendices giving the rules framed under the Act by the High Courts of Bombay, Calcutta and Madras. The index to the work is full. The get-up and printing of the work are excellent; and we hope the publication will be found useful by the practitioners.

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VICARIOUS LIABILITY.

An interesting question is raised in the recent case, *Sherjan* v. *Alemuddin*.[1] The defendant had obtained a decree for money against the plaintiff and three others and had taken steps to execute it against the judgment-debtors other than the plaintiff. The defendant's agent having a grudge against the plaintiff procured the attachment and sale of his cattle in spite of the tender of the sum which was due.

On those facts the question arose on second appeal whether the defendant could be made liable in damages. The question was decided against the defendant on the ground that he employed the wrong-doer as his agent and that it was immaterial that the particular act was not done for the defendant's benefit.

The judgment may fairly be said to be based on *Lloyd* v. *Grace* [2], a case which it is easy to show is utterly unlike the Indian case. In *Lloyd* v. *Grace* [2] the wrong-doer was an agent in the sense in which that word is used in S. 182 of the Contract Act. Being a solicitor's clerk he was employed by the defendant to represent him "in dealings with third persons," to wit, with those who might seek his services as clients. Employing him in this way he represented him as a person on whose honesty a skilled client could rely. The plaintiff being led to put his trust in the clerk and being defrauded by him was in justice entitled to say that the fraud of the agent was the fraud of the principal and it was immaterial that the fraud was committed by the clerk for his own gain and not for the benefit of the defendant. The solicitor who invites clients to have their business transacted by a managing clerk may be said to guarantee the honesty of the clerk and so to render himself liable for his misdeeds. The difference between the facts of this case and those of the Calcutta case is obvious. In the latter the agency was not of the kind indicated above; there was no representation or undertaking. It

1. (1915) I. L. R. 43 C. 513. 2. (1912) L. R. A. C. 716.

may be said that the agent was put into a position to do the wrongful act and language of that sort is used in the judgment. But the same may be said with regard to a coachman and his master. The coachman in the employment as driver of a carriage may do injury to a third person on the high road and may render his master liable for it. But to establish such liability it does not suffice to prove the fact of employment; it must further appear that the coachman was at the time driving on his master's errands for the master is not liable for the negligence of a servant who is using the carriage for his own amusement, *Saunderson* v. *Collins* [1]. Similarly with the agent in the Calcutta case, it might be thought that the employer having directed him to attach the property of A could not be made liable for his conduct in attaching the property of B.

Another class of cases still more closely in point might well have been cited. I refer to the cases relating to the liability of sheriffs for the acts of their officers, and there are also cases relating to bailiffs such as *Lewis* v. *Read* [2]. This latter certainly does not support the judgment. As to the sheriff's cases they stand on a peculiar footing for the sheriff is liable for everything done by colour of the warrant.

In the old case, *Saunderson* v. *Baker* [3], the sheriff was held liable for the act of the officer who by mistake arrested the wrong person. That is intelligible enough. Even if there are cases in which the sheriff has been made to pay damages for the deliberate arrest of the wrong person, they would not, regard being had to the peculiar position of sheriffs as public officers lend any material support to the view taken in Calcutta.

As to the cases other than *Lloyd* v. *Grace* [4], cited in the report, most of them belong to the same class. There are two however in which the agency more closely resembled the agency in the Calcutta case and neither of them lends any support to the judgment. In *Burmah Trading Co.* v. *Mirza Mahomed* [5], the tort consisted of conversion of the timber of a trader carrying on business in rivalry with the defendant. The charge broke down for failure to prove the alleged agency at the particular date, but in the judgment prominence is given to the absence of proof that the act

1. (1904) 1 K. B. 628.
2. (1845) 13 M. & W. 834.
3. 3 Wils. 309.
4. (1912) L.R. A.C. 716.
5. (1878) L. R. 5 I. A. 137.

charged was done for the benefit of the defendant. In the other case, *Gopal Chandra* v. *Secretary of State* [1] the decision was also in the defendant's favour.

On principle it is difficult to see why a man should be held responsible for an act quite different from that which he ordered to be done. You give directions for the seizing of some named person's goods and your agent arrests his person as in *Richards* v. *West Middlesex Water Co.* [2]. How is that different from the case when the agent deliberately seizes the goods of B. instead of those of A? Cases of mistake stand on a distinct footing. It is reasonable enough that the man employing an agent for such purposes should be deemed to guarantee due care in the performance of the act. An act done by an agent under mistake may come as the act of the principal, since the latter might himself have made the mistake. It is a long step further that the High Court of Calcutta has taken. It must be remembered that the lamentably meagre report gives no particulars as to the degree of control over his agent exercised by the defendant or the latter's knowledge or experience of the agent's character which might on the analogy of the cases concerning the liability of persons keeping dangerous animals be material.

If there were any special circumstances there is nothing to show that they weighed with the Court. The case as reported is authority for the broad proposition that an agent directed to do a lawful act in regard to a named person and deliberately acting in a similar way against another person and thus doing for his own purposes a patently wrongful act may involve his employer in liability for damages.

H. H. SHEPHARD.

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1. (1909) I.L.R. 36 Cal. 647.
2. (1885) 15 Q. B. D. 660.

SUMMARY OF ENGLISH CASES.

John Russel and Company, Limited v. Cayzer Irvine and Company, Limited : (1916) 2 A. C. 298.

Practice—Service out of Jurisdiction—Rules of the Supreme Court, O. XI, R. 1 (g)—Writ issued against two defendants domiciled in Scotland—Acceptance by one defendant—Service out of jurisdiction on the other defendant cannot be ordered.

Where a writ was issued in the King's Bench Division, against two defendants both of whom were resident in Scotland and one of whom was served on his London Solicitor who accepted service and submitted to jurisdiction, service out of jurisdiction cannot be ordered on the other defendant under O. XI, R. 1 (g) of the Rules of the Supreme Court which provides that " service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever any person out of the jurisdiction is a necessary or proper party to an action *properly brought* against some other person duly served within the jurisdiction. ''

In the words of Lord Sumner, the words " properly brought " enure to the protection of the person out of the jurisdiction whom it is proposed to serve with process. The persons who are already defendants in the action, although they may submit to the jurisdiction and so preclude themselves from raising any objection, cannot affect the rights of third parties.

Per Lord Wrenbury : " Properly brought " in the rule means at any rate, includes brought with a due observance of the process of the court against a person who could properly be served with the process of the court and not because he chooses voluntarily to submit himself to the jurisdiction of the court.

Daimler Company, Limited v. Continental Tyre and Rubber Company, (Great Britain) Limited : (1916) 2 A. C. 307.

Alien enemy—Company incorporated in England—Share capital held by alien enemies—Trading with enemy—Right to sue—Secretary, right to bring action on behalf of Company.

A company incorporated in England but all of whose shareholders excepting one were Germans residing in Germany was formed for selling Tyres in England. All the directors were also Germans residing in Germany. In an action for the recovery of a trade debt by the Secretary of the Company two

pleas were raised: (1) that the company was an alien enemy and payment thereto would be trading with the enemy, (2) the Secretary had no authority to bring the action on behalf of the company.

With regard to the first plea, *held* by Lords Shaw and Parmoor: A company incorporated in England and carrying on business in England though the shareholders thereof are alien enemies is not an enemy company or company of enemy character.

By Lord Halsbury: Such a corporation is in substance an enemy partnership and a payment thereto is clearly trading with the enemy.

The mere machinery to do an illegal act will not purge the illegality. No person or any body of persons to whom attaches the disability of suing in a state of war can shield the payment of money to an enemy under the machinery of a company.

By Lords Atkinson, Parker, Mersey, Kinnear and Sumner, circumstances touching the control and management of the company ought to be investigated to see whether the company had assumed an enemy character.

Held, on the second plea, the action was commenced by the Secretary without authority.

In re **Lodwig: Lodwig** *v.* **Evans**; (1916) 2 Ch. 26 C. A.

Will—Construction—Vested or contingent interest—Bequest to children when the youngest attains 30—Children dying under 30—Rights of.

Where a testator gave his residuary realty and personalty to trustees upon trust to sell and convert and out of the proceeds to pay a weekly sum to his daughter-in-law until the youngest of her children by his son should attain the age of 30 years, and directed that after the youngest of his said grand-children should attain that age the trust funds should be divided between his (the testator's) daughter-in-law and her said children in equal shares; and in the event of any one of his said grand-children dying leaving lawful issue him or her surviving the share of the parent so dying should be divided between his or her children, *held*, upon the construction of the will, that there was nothing to make the gifts to

the grand-children contingent merely by reason of the fact that postponement of the division was directed until the youngest grand-child attained 30.

In re **Roberts: Roberts** *v.* **Morgan**: (1916) 2 Ch. 42.

Will—Construction—Gift to tenant for life—Remainder as to specific properties to testator's children—Gift over if child should "die without leaving legal issue"—Period of division—Period of Vesting, of indefeasible Vesting—Leaning of Courts.

In cases with regard to real estate, the court leans in favour of vesting at an early period rather than at a later period, and leans also to a construction which will give an indefeasible vesting earlier rather than later.

By his will a testator gave his wife a life-interest in all his property, and then from and after her decease he divided his property amongst his four children in the following way: He gave property called T and £ 100 in money to his son J; he gave £ 1000 secured by way of mortgage on other property for the use and benefit of one of his daughters; and he gave a third estate between his other two daughters. The will also declared that "if any of my (testator's) said daughters or son die without leaving legal issue, her, their, or his share shall be divided equally between the survivor or survivors of him or her or them so dying without leaving legal issue, share and share alike as tenants in common and not as joint tenants."

Held, that the gift over was limited to the event of the child of the testator dying without leaving legal issue during the life of the testator's widow but that it did not extend to any event occuring after her death.

In re **Stanley's Settlement: Maddocks** *v.* **Andrew**: (1916) Ch. 50.

Deed—Settlement—Construction—Estate for life by implication.

When by a settlement the settlor assigned certain lease-hold property to trustees upon trust to pay the balance of the income thereof to his two daughters, M. and R, for their natural lives "as

tenants in common and not joint tenants" and "from and after the decease of the survivor of them then to the use of their respective child or children, share and share alike, as tenants in common and not as joint tenants," *held* (1) that each of the daughters took a life-estate in remainder in the other daughter's share on that daughter's death, on the principle that a life-interest was to be implied in favour of the survivor of the tenants in common and (2) that the gift in remainder was of the whole corpus to all the children of both daughters as one class and not of the corpus to the child or children of one daughter in that daughter's share only.

Cassel *v.* Inglis: (1916) 2 Ch. 211.

Stock Exchange—Member—Application for re-election—Discretion of committee empowered to elect if they deem eligible—Refusal of application—Reasons not given—Candidate not heard—Validity of refusal —Conditions.

Plaintiff was a member of a Stock Exchange which was governed by a deed of Settlement and rules made thereunder. Rule 21 gave the committee, in whom the management of the undertaking was vested, the duty of re-electing a member if they *deemed* him *eligible*, whether any charge was made against him or not. In March 1916 the plaintiff applied for being re-elected but his application was rejected by the committee without any reasons being given for their doing so. The plaintiff was not also given an opportunity of offering any explanation which might have induced the committee to re-elect him. Under these circumstances the plaintiff commenced the action for a declaration that the decision of the committee rejecting his application was invalid and inoperative inasmuch as he had not (*a*) been informed of the objection to his re-election and (*b*) been given a proper opportunity of being heard in respect of that objection. He neither alleged nor proved that the committee wrongfully held him guilty of any offence, nor that any specific charge was made or decided against him, nor that the committee acted from any improper motive, nor that their decision was not come to and their procedure selected in the circumstances within the limits of honesty, reason and justice. *Held*, that the Committee had the right to decide how and by what procedure they would carry out

the fiduciary duty committed to them, that in the absence of evidence to the contrary they must be assumed to have to come to a conclusion against the plaintiff for some good and sufficient reason connected with the true interests of the Stock Exchange and that their right to do so under the rules should be preserved to their *cestuis que trust* as a whole.

Held further that (1) cases relating to the procedure of a private or non-judicial tribunal selected to deal with an existing issue *inter partes* and (2) authorities on the expulsion of members from clubs and other societies for misconduct had no bearing on the question to be decided.

Lovesy *v.* Palmer: (1916) 2 Ch. 233.

Agent—Contract on behalf of undisclosed or unnamed principal—Right to sue on Contract—Liability to be sued on it.

An agent, who contracts only on behalf of an undisclosed or unnamed principal, and not on his own account, can neither sue nor be sued on the agreement.

Sebright *v.* Hanbury: (1916) 2 Ch. 245.

Practice—Interrogatories to persons not parties when allowed or not allowed at instance of plaintiff—Supreme Court Rules—Or. 28, R. 12; Or. 31, R. 1—Effect.

Interrogatories relating to the names of persons not already parties to an action are only allowable where the object is either to make the proceedings complete and effective for all purposes or to enable the plaintiff more effectively to substantiate the case which he makes against the existing defendant. Plaintiff is not so entitled where the result would be in one, and the only relevant, event to discharge the defendant from all liability.

In re **Borwick's Settlement Woodman *v.* Borwick**: (1916) 2 Ch. 304.

Grant—Settlement—Condition inconsistent with—Condition repugnant to Public Policy—Settlement of share on infant. Maintenance allowed to infant if he should not be in custody or control of his father—Validity of condition.

Where by a Voluntary Settlement a share of £ 10,000 Stock was settled upon an infant grandson of the settlor by his daughter, who was given a life-interest therein and the trustees of the settlement were empowered at their discretion to apply any part of the income of the £ 10,000, not exceeding 500 £ a year, for the maintenance, education, and advancement or otherwise for the benefit of the infant but were directed to discontinue such payment whilst the infant should be "in the custody or control" of his father, or his father should "have anything to do with his education or bringing up," *held* in a suit by the infant by his father as next friend, for the allowance payable to him under the settlement (the father not being willing to give up the custody or control of the infant and his education) that the condition affecting the father was not repugnant to the interest given by the settlement or contrary to public policy and that the infant was therefore not entitled to the allowance.

Kaufman Brothers *v.* **Liverpool Corporation:** (1916) 1 K, B. 860.

Public authorities—Protection—Limitation of action for claim for Compensation under Riot Act—Whether "act, default or neglect in the execution of any Act, duty or authority."

Under the Riot Act, a person whose shop or house was destroyed or damaged by riot could claim compensation at a certain rate from the Police authority and there was also provided a right of suit for the person against the Police authority in case they do not fix the compensation or if he is dissatisfied with the amount fixed. Where a person brings a suit alleging deficiency in the amount of compensation, such a suit is not one brought for any act, neglect or default in the execution of any act, duty or authority within the meaning of the Public Authorities Profection Act, S. 1; and the limitation of time for bringing an action under that section does not apply.

Lester *v.* **Hickling**: (1916) 2 K. B. 302.

Sale of goods—Bill of Sale—Subsequent agreement—Defeasance—Bills of Sale Act (41 and 42 Vic. C. 31) S. 10 Sub-sec. 3—Bills of Sale Act (45 and 46 Vic. C. 43) Ss. 8 & 9.

Subsequent to the execution of a bill of sale and as a distinct transaction, an agreement was entered into between the grantor

and the grantee that the latter would not enforce the bill of sale so long as the grantor continued to pay money in certain instalments. The Bill of sale was registered without the terms of the subsequent agreement being included in it.

Held, that the agreement, not having been made previous to or contemporaneous with the giving of the bill of sale, was not a defeasance within S. 10, Sub-sec. 3 of the Bills of Sale Act, 1878; that it was therefore unnecessary that the agreement should be included in or written on the same paper or parchment as the Bill of sale; and that the Bill of sale was good.

Malzy *v.* **Eichholz**: (1916) 2 K. B. 308 C. A.

Landlord and Tenant—Covenant for quiet enjoyment—Express or implied—Nuisance by another tenant of lessor—Liability of lessor, extent of—Derogation from grant.

If there is an express covenant dealing with a particular matter as to the demised premises there is no room for an implied covenant covering the same ground or any part of it.

A lessor is not liable in damages to his lessee under a covenant for quiet enjoyment, for a nuisance caused by another of his lessees, merely because the lessor knows that the latter is causing the nuisance and does not take active steps to prevent the commission of the injurious act. There must be active participation on the part of the lessor, in the act complained of, in order to make the lessor personally liable.

A common lessor is not bound to exhaust for the benefit of one of his tenants, all the powers that he may have under agreements with other tenants.

Cescinsky *v.* **George Routledge and Sons, Ltd**: (1916) 2 K. B. 325.

Copyright—Joint owners—Infringement by one—Injunction—Copyright Act (1 and 2 Geo. 5 C. 46) Ss. 1 sub-sec. 2, 2 sub-sec. 1.

Where the copyright in a book of which the plaintiff was the author was vested in the plaintiff and the defendants equally, and the defendants, without the consent of the plaintiff, published another book, which was an infringement of the copyright in the plaintiff's book,

Held, that the plaintiff was entitled to an injunction restraining the defendants from infringing the copyright, notwithstanding the fact that the defendants were part owners of the same.

J. R. Munday, Limited *v.* **London County Council**—(1916) 2 K. B. 331 C. A.

Practice—Costs—Payment into Court—Suit for damages caused by negligence—Denial of liability—Admission of Negligence—Damage denied—Form of Notice—County Court Rules, 1903 and 1914, O. 9, R. 12.

In a suit by the plaintiffs in the County Court, for damages for injury to their horse caused by the negligence of the defendants' servant, the defendants paid into Court, under O. 9 R. 12 of the County Court Rules 1903 and 1914, a sum of £ 40 with the following notice: "Take notice that the defendants admit that the accident was caused through their negligence, but they deny the alleged damage, and, whilst in this manner denying liability, they bring into Court, and say that this sum is enough to satisfy the plaintiff's claim." *Held*, that the notice was neither embarrassing nor a sham, but a proper and valid notice, and that the notice admitted negligence, though it put in issue the damage alleged. The plaintiffs having been awarded only £ 40 as damages, were not entitled to their costs.

Where there is a payment into Court with an admission of liability the plaintiff can take the money out; where, however, there is a denial of liability, he cannot get the money out until he has established the liability of the defendant, unless he takes it out in satisfaction of his claim.

Lord Ashburton *v.* **Gray**; (1916) 2 K. B. 353 C. A.

Costs—Discretion of Court—Limits of—Arbitration—Powers of Arbitrator—Legislative provision for compulsory Arbitration—Agricultural Holdings Act (8 Edn. 7 C. 28) Sch. ii, Rr. 14 and 15.

In exceptional cases and for sufficient reasons, a Court can, notwithstanding the success of the plaintiff in an action, order him to pay the whole of the costs thereof. But a Court has no power to order a defendant to a successfully resisted claim to pay the whole costs of the action. In the one case the plaintiff comes to the court, and the court has complete control. In the other case the defendant never wishes to be there, but is brought there at the summons of the king at the instance of the plaintiff,

Where there has been a reference to arbitration under the compulsory provisions of the Agricultural Holdings Act, 1908, the arbitrator has no wider discretion than a Judge of the High Court to deprive a successful party of his costs of the proceedings. In ordinary circumstances, a plaintiff who has succeeded in recovering a substantial sum, though much less than his claim, should not be made to pay the costs of both parties, unless the court finds that the plaintiff never ought to have taken the proceedings or has been guilty of misconduct.

The case of an arbitration under the Arbitration Act, 1889, where the parties have submitted the question of costs to a tribunal selected by themselves, is different.

Capel *v.* Soulidi (1916) 2 K.B. 365 C. A.

Shipping — Charterparty— Construction —"Commandeer," meaning of.

The owner of a Greek ship chartered her for 12 months to the plaintiffs in England, to carry certain cargoes within the limits specified in a Charterparty dated 6—5—1915. It was a term of the Charterparty that if the ship should be 'commandeered' by the Greek Government, the Charterparty should be cancelled. While the ship was lying at Marseilles discharging cargo for the charterers, the Greek Government on 25—9—1915 sent an order to the captain of the ship directing him to proceed to Greece and to place the ship at their disposal, if they should desire to use it. On 11—10—1915, while the ship was still at Marseilles, the Greek Government withdrew their order and released the ship. *Held* that the ship was effectually 'commandeered' and that the Charterparty was thereby cancelled.

(1916) 1 K. B. 439, affirmed.

Heath's Garage, Limited *v.* Hodges: (1916) 2 K. B. 370 C. A.

Tort—Nuisance—Highway—Sheep straying on highway—Damage to vehicle using highway—Liability of owner of land to fence it—Duty to the public.

Apart from special legislation, it is no part of the duty of an owner or occupier of land adjoining an ordinary highway to fence it so as to prevent harmless animals like sheep from straying upon the highway.

The plaintiffs sued for damage to a motor car alleged to be caused by the negligence of the defendant in the following circumstances. While the car was being driven along a highway in the daylight, at a moderate speed, several sheep were going unattended on the highway, having escaped through the gaps in a defective hedge on the defendant's land. The car stopped but two sheep ran into the car and caused it to be overturned and damaged. *Held*, dismissing the suit, that the defendant was under no duty to the plaintiffs as members of the public using the road, to keep his sheep from straying upon it and that the accident was not the direct and natural consequence of the breach of any duty on his part.

The King *v.* **Watson :** (1916) 2 K. B. 385 C. A.

Receiving stolen goods—Essentials of offence—Negotiation for sale of goods, not enough—Possession or control essential.

A person who negotiates for the sale of goods which he knows to have been stolen cannot be convicted of receiving the goods knowing them to have been stolen unless it is also proved that he has been in possession or control of the goods either by himself or jointly with the receivers.

Greene *v.* **Greene :** (1916) P. 188.

Restitution of Conjugal Rights—Reasonable cause—Burden of Proof—Matrimonial offence, absence of—Discretion of Court to refuse relief—Tests of—Impossibility of Co-habitation.

Where in a suit by a wife for restitution of conjugal rights, the husband pleads that there was reasonable cause for his having separated himself from his wife, the onus of proving it rests on him.

Even in the absence of proof of a matrimonial offence on the part of the plaintiff, in a suit for restitution of conjugal rights, the Court has a discretion to refuse relief. The fact that the wife has developed habits of intemperance and exhibits undue jealousy of her husband and frivolity of conduct, does not constitute a defence to an action by her for restitution of conjugal rights. Where the husband pleads reasonble cause for leaving the wife, and the wife seeks restitution the Court should refuse relief to the latter only if it has become practically impossible for the spouse to live together.

The Bangor: (1916) P. 181.

International Law—Prize Court—Neutral Vessel—Enemy service —Capture in Neutral Territorial Waters—Validity.

It is a well-established rule of International Law that neither an enemy, nor a neutral acting the part of an enemy, can claim the restitution of a captured vessel on the sole ground that the capture took place within neutral territorial waters; and that it is only by the Neutral State whose neutrality has been violated that the validity of the capture can be questioned.

JOTTINGS AND CUTTINGS.

The Law Dinner.—We are glad to say that this year's Law Dinner which came off last Saturday was as great a success as any of its predecessors and it had this unique feature in addition that it was presided over by an Indian Advocate General and the principal guest of the evening, the Chief Justice was an Indian. At the time the institution was started by Mr. Corbet (who, we are glad to learn, is improving and will be able shortly to return) though no doubts were felt as to its utility considerable misgivings were entertained as to its feasibility but these misgivings have all been dispelled by the success that has attended the movement. As we said, no doubts were at any time felt as to its usefulness and we feel sure that the words of the learned Officiating Chief Justice wishing for its permanence, will have ready response all over the country. Even as a ceremonial we think such an institution has a great value. It brings into prominence the unity of purpose that runs through us all, the Bench and the Bar, high and low, no matter whether High Court Judge, District Judge, or Subordinate Judge, Advocate, Vakil or Solicitor. We have no reason for existence, any branch of us, except as collaborators in the sacred task of administering justice. By being reminded of that once in a year, even in a spectacular way, we have no doubt, we will be considerably helped in realising that service to the community is the reason for our existence and after all, their good must be the governing factor in all our movements. The arrangements were excellent and did great credit to those that were in charge of them. Lateness of the hour is hardly congenial for the appreciation of lengthy speeches and we are glad that the speakers recognised this fact.

English Barrister in French Court.—For the first time on record (says the Paris Correspondent of the Daily Telegraph) a member of the English Bar has pleaded in a French Court. The case was unimportant—a suit between a tradesman and an ex-Sultan of Zanzibar—but the interesting point is that a precedent has been established. Mr. Perdrau, of the Middle Temple, was especially authorised to appear as counsel for the ex-Sultan. Maitre Henry Robert, Batonnier of the Order of the French Advocates, made a particular application for the admittance of the English Barrister to plead in the French Court, and appointed a well-known French Lawyer, Maitre Ambelouis, to assist him. The Court granted the application as a compliment to the English Bar, and in consequence of the alliance in arms between France and England. The precedent being thus established, in future members of the English Bar will probably be allowed on occasion to plead in French Courts, a thing they have never been able to do before.—*Law Journal, August 5.*

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Length of Trials.—'How long do you think your case will take ?' Sir George Jessel once asked a well-known Q. C. not accustomed to the ways of his Court. 'Quite a long time, my lord ; my opening speech will take at least three days,' was the reply. 'Not in my Court, sir, it won't' responded the most rapid of modern Judges. And it did not. But Jessel had less reason than has the Chancery judge of to-day to keep in view the possibility of an appeal. A Judge of first instance in these days knows that any attempt to cut short a trial may eventually result in protracting the proceedings by provoking one of the parties to take the case to the Court of Appeal.—*Ibid.*

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Beards and Inns of Court.—Nowhere was there more prejudice against beards than at the Inns of Court centuries ago. The 'Black-books' of Lincoln's Inn of the 16th century (says the Daily Chronicle) are full of references to offenders who were 'fyned double comens durynge such tyme as they shall have any berde.' This proving ineffective, a whole batch of bearded Barristers was in 1554 'banysshed from ye Howse,' and shortly afterwards a Judge's order was obtained for the compulsory shaving of some of the members. The Inner Temple benchers were not quite so severe for a fine of 20 *s.* was the sole penalty imposed in 1555 for 'wearing beardes of more than three weekes growthe.' The war against bearded barristers continued at the

Inns of Court until the 17th century. Long after this, however, the prejudice against the unshaved barrister remained. The late Vice-Chancellor Bacon carried his dislike so far that he always refused to listen to bearded or moustached counsel, pretending that he could not hear them. Even now, although there are plenty of bearded barristers and K. C.'s, few have attained eminence. The most brilliant exception was perhaps the late Judah Philip Benjamin, 'silver tongued Benjamin,' who despite of his moustache and American "Goatee" earned the princely income of 35,000 £ *a year.—Ibid.*

CONTEMPORARY LEGAL LITERATURE.

Unlike Wordsworth who had a very poor opinion of lawyers Charles Lamb had many lawyer friends whose friendship he warmly cherished and for which says a writer in the *American Law Review*, July-August, the legal profession should gratefully remember his memory. "The poet's Epitaph in the Lyrical ballads" he indignantly wrote to Wordsworth, "is disfigured to my taste, by the vulgar satire upon parsons and lawyers." Lamb objected specially to Wordsworth's following stanza:

"A lawyer art thou? draw not nigh!
Ed, carry to some fitter place
The keenness of that practiced eye
The hardness of that sallow face."

Making Bacon's Lost Rules and Decisions the peg, another writer hangs his panegyric on Roman Law which he considers infinitely superior to all other systems of Law. According to the writer in the History of English Law, Bacon represented the Roman system, Coke the feudal or the common law. The latter specially owing to its appeal to insular prejudices gained predominance, he thinks, with disastrous consequences. He wishes that instead of the Common Law, the American people accepted the Civil Law for instance as enacted in the Code Napoleon to the infinite advantage of the litigant public. It is to be noticed that Japan in search of a perfect system of jurisprudence for her country, adopted the Civil Law in preference to the English.

Another writer considers the history of lawyer's fees. In Greece and Rome, till the very end, the lawyer's services were purely gratuitous and it is said of Cicero that he proudly declined to accept any portion of the honorarium which the people of Sicily offered for his services in the trial of Verres. The same holds good in theory in England though in practice, the only net

result of it is that the advocate is not liable for neglect though he receives fees. In the United States of America, with the single exception of the State of New Jersey, which yet adheres to the English rule, it has been long held that a contract between a lawyer and his client for compensation for his services, is enforceable like any other contract between laymen subject to this qualification that it is improper to stipulate for a portion of the thing in action, though it is not deemed improper to stipulate for a fee bearing a proportion to the value of the subject-matter. This distinction the writer thinks is unsound and reminds one he says, of Gilbert A. Becket in the comic Blackstone when he states that when an Act of Parliament is repealed and thereafter the repealing statute is repealed, the repealed Act is thereby re-vitalised and put in operation on the theory that if A kills B and C kills A, B is thereby instantly restored to life. Speaking of "refresher" he says that this made its first appearance in *the trial of Q.* v. *Castro* [1] (sequel to the Tichborne Case) in which Mr. Kenealy had to be frequently regaled with these refreshers to give him power to stand the strains of a six weeks' address to the Jury.

Another writer in the same journal gives a description of the British constitution and institutes some interesting comparisons between the American and the British constitutions. It is almost as difficult he says to radically change the British constitution as the American though changes have been effected. In the last century there were 5 amendments to the federal constitution. During the same period, England also had practically the same number of changes in her constitution—the Reform Bill, manhood suffrage, the ballot abolition of the property qualification for membership of the House of Commons, the removal of Catholic and Jewish disabilities and the Parliament Act.

The journal of Comparative Legislation (July 1916) contains many articles of interest. In one of them Mr. Reason Pyke urges the desirability for the setting up of an International tribunal. On the one hand the Government should not be able to shelter itself behind its own judges; on the other, the judges should not be able to hamper the Government in any regularised use of its sea power for the successful prosecution of the war. Another writer gives a summary of the rights and duties of Public trustees in the different parts

1. (1916) 2 A.C. 97.

of the British empire. In another article Mr. Walter George Smith describes the amount of success that has attended the efforts of the conference for uniform State Laws in the United States of America. Another article is about the legal procedure in Canada which seems to be largely based on the English model. From the Courts of different States there is an appeal to the Supreme Court of Canada from which an appeal lies by leave to the Judicial Committee. The Supreme Court seems to have many consultative functions in addition to its purely judicial functions. Exchequer Court is a peculiar institution which deals with actions against the Crown or certain actions against public bodies. Professor Courtney Kinney describing the case method of teaching Law inaugurated by Professor Langdell points out some of its advantages over the lecture system. Dr. Keith compares the constitution of Canada with that of India. A short account of the Indictments Act is given by Mr. G. Glover Alexander which by simplifying the law on the subject, has made the recurrence of the scandals such as were witnessed in the 17th and 18th centuries by technical flaws in Indictments impossible.

Sir John Macdonnel urges the codification of the commercial laws of the Empire which have already approximated to each other to a large extent. Norway is taking the lead in the new kind of legislation which tries to protect the rights of children born out of wedlock by giving those children rights of inheritance to both the parents and casting upon the parents the duty of maintaining and educating them. Dr. Blake Odgers traces the sources of the influence of Rousseau's Theory of social contract. The doctor thinks that it owes much of its power to the style and manner of the author. It will be found that Rousseau drew his inspiration in respect of most of his theories from the Bible which he had carefully studied.

A writer in the Canadian Law Times discusses the extent to which the appellate court should interfere on questions of fact. He says that the rule that the findings of fact should not be interfered with when resting on the credibility of witnesses seen by the Judge is not absolute and admits of exceptions. The rule has little or no application when the evidence is not purely oral or when the Judge has not himself seen the witnesses.

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THE COURT FEES ACT AMENDMENT PROPOSALS.

In the recent circular letter addressed by the Government of India to the Local Governments, on the above subject, the 'necessity for an enactment more suited to modern requirements' is said to be 'generally recognised'; but a curious feature of the 'comprehensive amendment' put forward 'as a preliminary' is the transfer from the Legislature to the 'Chief Controlling Revenue authority' of the function of laying down the principles of valuation in respect of the most important class of suits in this country *viz.*, suits for land. We do not wish to be understood as implying anything against the manner in which the duty is likely to be discharged by the new authority; but we do say that the provision is distinctly retrograde. Our readers may remember the protests evoked in England in recent years by what has been termed 'Skeleton Legislation', entrusting to executive departments large powers of law making by way of statutory regulations. The practice is, if anything, more marked in this country; and a matter of such vital importance as Court-fees, which on no theory can be regarded as a source of revenue properly so called, is certainly not a fit subject for executive regulations. We agree that under the existing law there is great inequality in the incidence of Court-fees as between different kinds of immovable property, but we fail to see how the Revenue authority is better fitted to deal with the subject than the Legislature. If for any reason it is found necessary to delegate the function, one should have thought that the High Court was the proper authority to be entrusted with it. This brings to our mind another provision in the draft Bill which, though of small importance by itself, seems to us uncalled for. Under S. 20 of the present Act, the High Court has to frame rules in respect of process fees chargeable in Civil and Revenue Courts; but the Bill proposes to vest this power, so far as Revenue Courts are concerned, in the Chief Controlling Revenue authority. The

reason for the change is not stated, but we cannot help expressing our unfeigned regret at every proposal, whether small or otherwise, tending to emphasise the anomaly of our Revenue Court system, and divorcing those Courts from the regular judiciary of the land.

A considerable portion of the draft Bill accompanying the letter is taken up with the proposed amendments to Chapter IIIA of the Act relating to probate, letters of Administration &c. These deal mostly with changes of detail, some of them being intended to bring the Indian Law in line with the corresponding provisions of the English Statute. The amendment also makes it clear that court fee for probate &c. is to be levied only on the *net* value of the estate and that no fee is payable if the net value does not exceed Rs. 1,000.

Two other amendments in the Bill deserve to be noticed, one which settles that only a fixed fee of Rs. 10 shall be leviable on suits under the Religious Endowments Act or S. 92 Civil Procedure Code and the other which substitutes the language of S. 149 Civil Procedure Code for the second part of S. 28 of the Court-Fees Act. The first has much to be said in its favour, both on principle and on grounds of expediency, though we are not without misgivings as to whether it will not give increased facilities to people to vent their private spites against trustees. The second will remove all doubts created by the reference to 'mistake or inadvertence' in the present section. We are not quite sure (in spite of the decision in *Nellavadivu* v. *Subrahmanya* [1]) if even the language of S. 149 Civil Procedure Code places it beyond doubt that a pauper suit (or appeal) can be effectually stamped, if by the time the application for leave to sue (or appeal) in forma pauperis is dismissed the period of limitation for the suit or appeal has expired. We would suggest an express provision to meet the case.

The draft Bill is not meant to be exhaustive and several points not dealt with in the Bill are referred to in the India Government's letter. First among them is a proposal that "in all applications for the assessment of mesne profits after decree, decree-holders should be required to value their claims, pay the Court fee on such valuation and be limited in the amount awarded

1. (1916) 31 M. L. J. 239.

to that claimed, unless the Court for reasons to be recorded in writing, considers that a decree in excess of such valuation should be allowed." We seriously doubt if an amendment to this effect will attain the object said to be in view *i.e.*, 'render decree-holders more careful in making extravagant claims'. It appears to us, on the other hand, that the provision restricting the award by the Court to the amount claimed will induce (if not oblige) people to err on the safer side by overvaluing their claim; and in most cases the necessity of paying the Court fee beforehand may not act as a sufficient deterrent. Where, however, parties have valued their claim at something less than they are found entitled to, it will be unfair to deny them what is justly due and it will not be easy for the Court to decide what the undervaluation was due to. The provision also seems to us open to objection on general grounds. It has now been held in several cases that no court-fee can be levied in respect of mesne profits subsequent to date of suit, and so far as such profits are concerned the rule can have no operation. Some observations in *Chedilal* v. *Kirath Chand* [1] (see also *Ramkrishna Bhikaji* v. *Bhimabai* [2], *Dwarka Nath* v. *Debendranath* [3]) would seem to suggest that Court-fees may be payable even in respect of future profits if they are claimed along with past profits; but it is difficult to see any foundation in principle for this view. As regards past profits the plaintiff puts an approximate valuation upon them in the plaint and we don't see why he should be called upon once again, after the preliminary decree, to put a valuation on the mesne profits. He has only to tender his evidence on the question and the Court has to decide what amount he is entitled to. The existing provisions of S. 11 seem to us sufficient to protect the interests of revenue. Now that under the new Code mesne profits are to be awarded by the decree itself and not left to be determined in execution, the second para of that section may be omitted.

The next question relates to the finality of the plaintiff's valuation in suits under cl. (iv) of S. 7. That is a point on which there may reasonably exist a difference of opinion. The balance of convenience seem to us on the whole to be in favour of leaving the plaintiff to his own valuation. If the

1. (1880) I. L. R. 2 A. 682. 2. (1890) I. L. R. 15 B. 416.
3. (1906) I. L. R. 33 C. 1232.

suit is one for accounts, the interests of public revenue are sufficiently protected by S. 11. In suits for injunction or in respect of easements, the subject matter is generally incapable of pecuniary valuation on any satisfactory basis and suits under sub-clause (*a*) of the clause relate to property which ex-hypothesi has no market value. Suits under sub-clause (*b*) will be considered later on. There remain only suits under sub-clause (*c*) *i. e.*, to obtain a declaratory decree or order where consequential relief is prayed. If the relief claimed is by way of possession, we presume that it will be covered by the clause relating to suits for possession. If, as frequently happens, an injunction is the consequential relief prayed, the suit stands substantially on the same footing as one under sub-clause (*d*). One other well known form of consequential relief is by way of cancellation of documents, decrees, etc. It is open to doubt whether it will be right to insist that in that class of cases the plaintiff should pay Court fee on the value of the property to which the document relates. Should it however be thought fit to empower the Court to check the plaintiff's valuation in suits under clause IV, the power must, it seems to us, be confined to cases in which the subject matter of the suit (as distinguished from the property to which the suit may generally relate) is such as reasonably to admit of a pecuniary valuation.

We may in passing refer to a cognate matter, *i. e.*, the power of the Court, in a suit for accounts or mesne profits, to award a decree for an amount in excess of its pecuniary jurisdiction. The cases on the point (as well as on the question of the forum of appeal in such cases) disclose such diversity of opinion as to call for the interference of the legislature to settle the matter in some way.

The letter next deals with the provision in S. 12 as to the 'finality' of a Court's decision about the fee payable in respect of a proceeding before it. The view taken in the majority of decided cases that the finality attaches only to determinations by way of calculation of amount and not to decisions as to the principle of assessment seems to us to be the right one. It appears to us also necessary that in so far as the legislature may think fit to allow a point of Court-fee to be raised before a higher Court, it should make definite provision for its being raised by an appeal or revision in the preliminary stage itself and not oblige a suitor

to pay it in the Lower Court or suffer dismissal of his suit and then raise the matter in an appeal or other proceeding against the decree itself. The decisions on the point are by no means uniform.

Two questions are raised in connection with the valuation of estates for probate etc., duty, one as to the point of time with reference to which the estate is to be valued and the other as to the extent of liability of estates passing by survivorship (under the Mitakshara Law). As to the 1st, it has to be borne in mind that the true value of an estate is its worth at the time of the owners' death, and as in the majority of cases the application for probate or letters of administration is likely to be made soon after the last owners' death, it seems desirable to adopt that criterion of valuation. As regards the 2nd, it is certainly incongruous to describe joint family property as property held in trust. If the Mitakshara theory is to be literally accepted no duty will be leviable even on the devolution of self-acquired property from father to son, for that too is by survivorship. It is now settled that the share of any member is during his life-time available for his creditors and in some parts of India it can be voluntarily alienated. It is therefore only right to provide that probate duty is leviable on such share. Where the co-parcener happens to be the father, even the shares of his sons in joint family property are available, subject to certain exceptions, for his debts, apart from any question of family benefit. On this ground, it has been sometimes suggested that the whole property may be treated as that of the father for purposes of levying court-fee. This however ignores the fact that the sons may, even during the father's life-time, deal with their interests in the family property.

The proposal that, in cases in which a deficiency in court-fees is discovered after the decision of the suit, the deficit should be made recoverable as an arrear of land revenue, seems to us too drastic. If the difference is small, it is scarcely worth while to pursue the matter; if the difference is large, the proposal would work great hardship, for, if the suitor had been told in time that he must pay a much larger amount by way of court-fee, he may not have proceeded with the suit at all. The State may reasonably be content with the protection afforded by the 2nd clause of S. 12 and trust to officers of courts to see that proper court-fees are paid in proceedings before them.

As regards suits for partition, we hope that the view taken in Calcutta and Allahabad will commend itself to the legislature, in preference to the Madras view. It is certainly hard that a co-parcener, whose right to participate in joint family property is not denied, should be asked to pay an advalorem fee as in a suit for possession, when he seeks to have separate enjoyment of his share. The Madras view as to sub-clause (b) of S. 7 (4) will also lead to this anomaly that even as regards a person whose right is denied, if he seeks a decree for joint possession he can value the suit as he likes, whereas if he seeks the equivalent of it by way of separate possession he must pay court-fee under clause 5. It is difficult to justify the distinction on principle. The sub-clause may well be dropped or made clearer.

The Calcutta and Allahabad Courts have however gone in for an unreasonable view as regards the Court fees payable on review applications. Whether or not the language of the present articles 4 and 5 of Schedule 1 is capable of being construed in the way adopted in Madras and Bombay, there can be little doubt that when review is sought only of a portion of a decree, it will be subjecting the party to a penalty to make him pay court-fee on the full value of the decree. We would also add that it is needless to make a distinction between applications presented before the 90th day and those presented afterwards.

There is much to recommend the proposal of the Honourable Maharajah Ranajit Sinha that in suits decided *ex parte* a moiety of the fee should be refunded to the plaintiff. We hope the Government will ultimately see their way to accept it.

There are two points, not mentioned in the Bill or in the letter, to which we would direct attention as fit subjects for consideration by the Legislature in this connection. The question of the Court-fee payable in respect of appeals against preliminary decrees has of late been frequently raised and it has been generally ruled that even in cases in which the preliminary decree only *declares* the rights of parties and does not fix the amount of liability, *ad valorem* Court-fee should be paid in respect of the appeal, on the basis of the valuation in the plaint. It often happens that the final decree is passed before the appeal against the preliminary decree is disposed of and the party is obliged to appeal against that decree also. Provision should be made relieving the party from payment of advalorem fee in one or the other of the appeals.

Prior to 1908, the court-fee on a memorandum of cross-objections (under S. 561 of Act XIV of 1882) was not only allowed to be paid at the time of *hearing* but was limited in amount to the difference between that paid by the appellant and the amount that would have been payable if the appeal had comprised also that part of the decree to which the cross objections relate. The amendment, by the Code of 1908, has made the fee payable in advance and the amount has to be determined as if it were an independent appeal. So far as the amount of fee is concerned, the older provision may, it seems to us, well be restored, especially in view of the fact that, under O. 41, R. 33 C. P. C. the court is empowered to afford the necessary relief even in the absence of a memo of objections.

SUMMARY OF ENGLISH CASES.

In re **Forrest Bubb** *v.* **Newcomb**: (1916) 2 Ch. 386.

Will—Construction—Legacy to "servants"—Farm labourers if included.

A testator gave "to each of my servants who shall have been in my service for three years prior to my decease, and shall be still in my service, one year's wages." When he died, the testator was possessed of about 700 acres of land and a house in which he employed several domestic servants. The testator farmed the lands himself, though he employed six labourers at ordinary labourers' wages, who, if servants, complied with the other conditions of the legacy.

Held that though these six labourers were servants in some sense, they were not servants in the service of the testator within the true meaning of the words used in the will, and that the testator was referring to persons who ministered in some way to his personal comfort, or his wants—persons of the class of domestic servants, though not necessarily only those employed in the house.

Elliott *v.* **C. P. Roberts & Co. Ltd.** (1916) 2 K. B. 518 C. A.

Negligence—Damages—Building Contract—Power reserved to owner of building to give special work to special tradesmen—Obligation on contractor to allow reasonable use of scaffolding to employees of owner of building—Duty of contractor, as invitor.

The defendants contracted with a local authority to remodel and enlarge a school building for a lump sum in accordance with the specification in the schedule annexed to the contract. This sum included sums for special works like providing and fixing hot water heating apparatus, and the local authority reserved to themselves the right to nominate special tradesmen to execute the work in which case the fixed sum for the work was to be deducted from the contract price and to be paid direct by the local authority to the tradesmen executing the work. By a clause in the contract all tradesmen and others executing any work or supplying any goods for the purposes of the contract who might at any time be nominated or approved by the local authority were thereby declared to be Sub-Contractors employed by the defendants. By a clause in the specification, the defendants were bound to afford facilities to tradesmen employed by the Local authority in the building including the use of any scaffolding erected by the defendants for their own purposes.

The Local authority, under the option reserved to them, contracted with a firm of hot water engineers to provide and fix the hot water heating apparatus in the building. The defendants in order to provide a gangway for their workmen over an opening in an upper floor of the building, laid down two planks side by side across the opening, but the planks were not fastened in any way. The plaintiff, a work man in the employment of the hot water engineers, in the course of his work was passing over the gangway when, apparently because the boards stipped, he fell down the opening and was injured. In an action against the defendants to recover damages for the injuries caused, as alleged, by their negligence, *Held* that the relation of the plaintiff towards the defendants was that of a person who had been invited by them to pass over the gangway and not that of a trespasser or a mere licensee.

Johnston *v.* Braham and Campbell: (1916) 2 K. B. 529.

Damages—Principal and agent—Negligent conduct of agent leading principal to embark on adventure resulting in loss—Measure of damages.

When a person complains of being misled by the negligence of an agent into entering into an adventure from which loss ensues he is entitled to recover that loss because if is the amount he has

actually less in his pocket, and he is entitled at best to be restored to the position in which he would have been if the agent had not been guilty of the breach of duty towards him. But he cannot add to that loss the speculative profits which he might have made if he had had his time or money at his disposal instead of having embarked in the adventure which has miscarried.

Fanshaw v. Knowles (1916) 2 K. B. 538 C. A.

Practice—Trial by jury—Privy Verdict—Civil cases—Separation of jury after summing up—Validity of verdict.

The rule of law that any separation of the jury after the judge's summing up in a criminal case invalidates their verdict, has no application to civil cases. In a civil action, after the judge had left the court one evening, the jury stated to the associate that they had agreed to a verdict on two points, but could not agree on the third and then separated for the night. Next morning they came before the judge and gave a verdict on all the three points, attaching a condition to the verdict. On the judge telling them that they could not attach the condition which they sought to impose, they withdrew it. *Held,* that the verdict was valid. The history of the law as to separation of juries, discussed by Lord Reading.

Tonnevold and Finn Fries, In re: (1916) 2 K. B. 551.

Shipping—Charterparty—Construction— Voyage involving "risk of seizure or capture"—Risk of being sunk by belligerent submarines.

A Norwegian vessel was hired for a term of five years by a Charterparty, made in 1912, which provided that "no voyage be undertaken...that would involve risk of seizure, capture etc. by rulers or Governments." An arbitrator found as a fact that a particular voyage would involve the risk of the vessel being attacked and sunk by German submarines. *Held,* that a voyage which involved the risk of the vessel being attacked and sunk by German submarines was one which would involve risk of "seizure" or "Capture" within the meaning of the charterparty.

Booth Steamship Company Ltd. v. Cargo Fleet Iron Co. Ltd. (1916) 2 K. B. 570, C. A.

Sale of goods—Right of stoppage in transit—Liability of vendor to carrier for freight—Sale of Goods Act, 1893 (56 and 57 Vic. C. 71) Ss, 44, 45, 46, 47, 48 and 61.

Where goods are stopped while in transit and before they reach their specified ultimate destination by notice from an unpaid vendor, the carrier is bound to act upon the notice by delivering the goods to or according to the directions of the vendor, and if he fails to do so he is liable to an action by the vendor for wrongful conversion.

The vendor on his part although he is not a party to the contract of affreightment, is bound to take the goods or give directions for their delivery on arrival and to discharge the carrier's lien for freight, and if he refuses to perform this obligation he is liable in damages to the carrier for the amount of the freight.

If the conduct of a vendor who has stopped goods in transit prevents them from being carried on to their specified ultimate destination, he is liable for the freight not only in respect of the whole voyage to the place at which the goods are in fact landed, but also to the ultimate destination.

The effect of stoppage in transitu is not to rescind the contract between the carrier and the purchaser or to vest the property in the goods in the unpaid vendor.

Law and Bonar Ltd. v. British American Tobacco Co. Ltd. (1916) 2 K. B. 605.

Sale of goods—C. I. F. Terms—Insurance against war risk —Duty of seller to give buyer facility for insurance—Sale of Goods Act, 1893 (56 and 57 Vic. C. 71) sub-sec. 3—Tender of documents representing goods duly shipped but lost.

S. 32, sub-sec. (3) of the Sale of Goods Act, 1893 which imposes on the seller the duty of giving the buyer information so as to enable the latter to insure the goods does not apply to a contract on C. I. F. terms entered into in time of peace, inasmuch as the contract itself provides for all the insurance that is contemplated or usual at the time when it is made; nor does the sub-section impose any fresh obligation on the seller to give notice to the

buyer so as to enable him to insure against war risks, if after the the Contract, war becomes imminent.

The tender of documents representing goods duly shipped in accordance with the Contract and insured against marine risks as required by the contract is not vitiated by the fact that the goods had actually been lost.

Mitchell, Cotts and Co. v. Steel Brothers and Co. Ltd: (1916) 2 K. B. 610.

Shipping—Shipper's duty to shipowner—Extent of—Knowledge of risk of delay in discharging goods at post of destination—Duty to communicate to shipowner—Liability of Charterer.

Whatever may be the full extent of the obligation upon a shipper of goods, it amounts at least to an undertaking by him that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the shipowner facts which are within his knowledge indicating that there is the risk, provided that the shipowner does not and could not reasonably know those facts.

The shippers of a cargo of rice on a vessel which they had chartered for a voyage to a port in Greece knew that the rice could not be discharged there without the permission of the British Government though they believed that they might obtain the permission. In fact they were unable to procure it, and the ship was considerably delayed. It was found that the ship-owners did not and could not reasonably have known that the permission was necessary.

Held, that the delay arose from a breach by the charterers of their obligation to the ship-owners and the latter had therefore a cause of action against the former in respect of the delay so caused.

Powell *v.* **Gelston**:—(1916) 2 K. B. 615.

Defamation—Libel—Publication—Letter addressed to one person opened by another—Liability of author.

A father intending to purchase a house from the plaintiff, asked his son with whom he was staying on a brief visit, to write to the defendant to make certain inquiries regarding the plaintiff.

The son wrote in his own name and from his own address asking for the information in confidence and promising not to let the plaintiff know the contents of the letter. The defendant replied by a letter which arrived at the son's house during his absence; and the father opened and read the letter, the son being entirely ignorant of it. In an action by the plaintiff against the defendant in respect of alleged libellous statements in the letter, it was found by the jury as a fact that the defendant did not know or expect that his letter might probably be opened or seen by any person other than the addressee, and that the defendant did not *bona fide* believe that what he wrote was true, but was actuated by malice in writing the letter.

Held that there was no publication of the libel by the defendant so as to make him liable in damages to the plaintiff.

Rex *v*. **Banks** (1916) 2 K. B. 621.

Criminal Law—Carnal knowledge of girl between thirteen and sixteen years of age—Reasonable cause to believe girl sixteen years of age—Prosecuting counsel, duty of.

Where a person was charged under S. 5 sub-sec. (1) of the Criminal Law Amendment Act, 1885, of having carnally known a girl of or above the age of 13 and under 16 years and the defence was that the accused person had reasonable cause to believe that the girl was of or above the age of 16 years. *Held*, that to escape liability, it was incumbent on the accused person to show that he had reasonable cause to believe, and did in fact believe, that the girl was at least 16 years of age. Prosecuting Counsel ought not to press for a conviction, but must regard themselves rather as "ministers of justice" assisting in its administration than as advocates.

JOTTINGS AND CUTTINGS.

A Scrap of Paper:—French Jurisprudence, says the *Daily Telegraph*, has just laid down that the expression "a scrap of paper" is libellous when applied to any document. A tenant had not paid his rent, and the landlord, the tenant being mobilized, wrote to the Minister of war that his tenant "looks upon the agreement signed by him as a mere scrap of paper".

The tenant sued the landlord for libel, and the court decided that "whereas the expression 'scrap of paper' has now become history, and will for ever brand the nation which has exceeded all records of duplicity and infamy, and whereas to apply such terms to any person is, and will always be the gravest insult to his honour, the landlord must pay £ 240 damages, and a fine of 5 f.—*The Law Students' Journal, (September).*

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Lawyers as leaders :—Yet another instance of the large part which lawyers are playing in the world's affairs in these momentous times is afforded by the formation of the new Greek Ministry, M. Kalogeropoulos, the new Prime Minister is the acknowledged leader of the Greek Bar, and received part of his legal training in France. The Prime Minister of England, France, and Italy are all lawyers, and have shown themselves to be practical men of affairs, capable of leading their respective nations at the most critical period of their history. When the time comes for arranging the terms of peace-terms which will fitly represent the triumph of the cause for which the Allies are fighting—the legally-trained minds of these lawyer-statesmen will have a special value in the settlement of the complex problems that will comfort the leaders of all nations. *The Law Journal.*

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The Death of Mr. Raymond Asquith.—Few of the supreme sacrifices of the great struggle have possessed a more poignant interest for the public than the death of the Premier's eldest son; none has evoked a more intimate feeling of regret at the Bar. Mr. Raymond Asquith was not merely the Prime Minister's son. The brilliant gifts which enabled him to emulate his father's achievements at Oxford also enabled him to win already a considerable position at the Bar. None of the youngermen in the profession showed more individuality or promise. Among the many expressions of sympathy which the premier has received in his bereavement none will be more sincere than those coming from the profession which is proud to have had both father and son in its ranks.—*The Law Journal, September 23rd.*

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Long Trials and Forensic Oratory.—Is the Bar responsible for the longer duration of trials? It is being boldly asserted in

connection with the prodigious case in Mr. Justice Eve's Court, that it is. There is a passage in Lord Alverstone's volume of reminiscences which, to some extent, seems to support this assertion. 'I remember,' he writes, 'Sir Henry James, himself one of the leaders on the Oxford Circuit, saying to a Queen's Counsel on the same Circuit, "X you lose a lot of cases by bringing in immaterial matters, which do your case more harm than good." X's reply was characteristic: "You are quite right, but I never lose a client." What however, this passage really makes clear is that litigants are more exacting in their desire to have their cases fully heard and it is a desire which some of the most distinguished judges, as well as many of the most eminent members of the Bar, have deemed it right not to discourage. Courts, after all, exist to give satisfaction to those who resort to them—even to those who are defeated in them. No litigant ought ever to leave the Courts without feeling that he has received a full and patient hearing. Well, I would rather lose in this Court than win in Mr. Justice, ————'s,' were the consolatory words of one well-known litigant when Mr. Justice Stirling, after an exhaustive hearing, gave judgment against him. The notion, which appears to prevail in some quarters, that the Bar has grown more talkative is quite devoid of foundation. 'He was careful to keep down repetition, to which the counsel, one after another, are very propense'—so it is written in the Biography of Lord Chief Justice North, and the passage is sufficient to show that the speeches of counsel in his time were not exactly models of brevity. Nor were they in the days in which Sir Joseph Jekyll wrote his witty lines:

> Behold the Serjeant full of fire.
> Long shall his hearers rue it?
> His purple garments come from Tyre,
> His arguments go to it.

Mr. Upjohn's speech in the Rhodesia mining case, which has already occupied more than twenty-five days, may not be a conspicuous example of forensic conciseness, but no reasonable person can believe that his tremendous speech has been wholly wanting in relevancy. If the speeches of counsel are longer than they used to be—and the statement that they are is not to be accepted without some qualification—it is only because they deal with more complicated matters than the advocates of other days were concerned

with. 'The taste of this age (like the taste for dry rather than sweet champagne) is not for florid declamation, but for clear, terse, pointed and practical speech.' That was said by Lord Russell of Killowen, himself one of the finest speakers the Courts have known in modern times, and it states a truth which is illustrated at the Bar no less than in the Senate. 'Declaim, sir! Why don't you declaim? Speak to me as if I were a popular assembly,' remarked a famous Scottish judge to an advocate who addressed him in language that betrayed not a trace of emotion. This love of declamation is certainly not shared by the judges of the present day. To them a peroration is an insult.—*The Law Journal, September 2, 1916.*

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Imprisonment for Debt.—Not less remarkable than the reduction in the general work of the County Courts is the decline in the imprisonment of debtors. What the late Sir Thomas Snagge called a 'barbarous and baneful system' has, in truth, been on the wane for several years past—how rapidly the following figures for nine years will show:—

1906......11,986	1909......8,904	1912......5,820
1907...... 9,214	1910......8,189	1913......5,711
1908...... 9,141	1911......7,681	1914......3,887

Yet another large decrease—due, no doubt, largely to the war—is recorded in the latest Returns. The number of debtors sent to prison in 1915 did not exceed 1,542—considerably less than half the number in the preceding year, and much the lowest number on record. In ten years—from 1906 to 1915—the number of warrants of commitment has fallen from 152,759 to 70,331. There is an increasing tendency on the part of the judges not to use their powers of imprisonment except upon the clearest proof that debtors have neglected to pay whilst having the means to pay.—*The Law Journal, August 19, 1916.*

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The Cab Whistling Nuisance.—The Home Secretary, after consulting the Commissioner for Police, has announced his intention to frame a Regulation prohibiting the use of cab whistles from 10 p.m. to 7 a.m. in certain areas of the Metropolis. As he prefaced this announcement by referring to the large number of wounded soldiers now in London hospitals, it is presumed that the specified areas will be exclusively those in which hospitals are situate. While, therefore, those who have complained of the nuisance will have good cause to welcome the suppression of cab-whistling in

its most mischievous form, some, at any rate, may regret that a more general use of the Home Secretary's powers to suppress it has not been decided upon. To those sufferers from the 'nightly torture' who do not reside in the neighbourhood of hospitals it will bring no personal relief.—*The Law Journal, August 19, 1916.*

BOOK REVIEWS.

INDIAN CASE LAW, ON EJECTMENT, *by Mr. Lal Mohan Mukhopadhyaya Published by Messrs. Butterworth & Co. Calcutta.*

A comprehensive view of the entire law of Ejectment in the infinitely varied Indian conditions was a desideratum and Mr. Mukhopadhyaya has well met it. A mere look at the contents will suffice to convince one of the enormous labour that this work must have involved. The profession must feel thankful to the Author.

LAW STUDENT'S INDIAN PENAL CODE: *Law Printing House, Madras.*

The bare text with a full index is as much necessary on occasions to the practitioner as to the student. Search after the text of the Act in a fully commented edition is verily a search for a needle in a bottle of hay. It is a neat and handy publication.

THE INDIAN DECISIONS, *(New Series) High Court Reports Madras Vol. 1 published at the Law Printing House, Madras.*

We are glad to say that the Law Printing House has brought out the first Volume of their Indian Decisions (New Series) which reprints volumes 1 to 4 of the Madras High Court Reports. The Madras High Court Reports have a supreme value to the legal profession by reason of the classical judgments of jurists of the eminence of Sir Colley Scotland and Holloway. The publishers give below the head note of each reported case, the references, to later cases in which each case has come up for consideration. The High Court Reports are a necessary supplement to the Indian Law Reports which the publishers have reprinted and we hope the profession will avail themselves of the opportunity thus afforded them. It is needless to say that the volume under review maintains fully the reputation for the neatness of printing and get up which is usually associated with the Law Printing House Publications.

The Madras Law Journal.

PART XXI.] NOVEMBER, 1916. [VOL. XXXI

EFFECT OF ADOPTION ON PRE-EXISTING RIGHTS.

[**Behari Lal** *v.* **Kailas Chandar,** (1896) 1 C. W. N. 121; **Birbhadra** *v.* **Kalpataru,** (1905) 1 C. L. J. 388; **Venkatanarasimha** *v.* **Rangayya Apparow,** (1905) I. L. R. 29 M. 437; **Dattatraya Sakhram** *v.* **Govind Sambhaji,** (1916) I. L. R. 40 B. 429.]

The Privy Council in dealing with the Medur case, avoided deciding the question, whether when a person is adopted, he is thereby divested of rights *already* acquired by him in properties belonging to his natural family. Judicial opinion in India is evenly divided upon the point. The earliest of the above cases (decided by Ameer Ali, J.) arose under the Dayabhaga law, but that circumstance seems to make no material difference in the decision of the question. The conflicting views may perhaps be conveniently described as dominated respectively by legal logic and textual authority. The text of Manu (IX, 142) is the starting point for the discussion and there has been some controversy not only as to its true interpretation but even as to its correct reading. The different considerations relating to this aspect of the question were so fully brought out in the evidence given in the Medur case by Mr. Sarkar Sastri and Mr. M. Rangachariar that we deem it desirable to place it before the profession substantially in its original form. We are aware that the Madras High Court held that their opinions were not admissible under the head of 'expert evidence,' there being no question of 'foreign' law—but we reproduce them as containing a full statement of the case for one side or the other, from the textual point of view.

The theory that adoption is analogous to 'Civil death' is based on a particular interpretation of Manu's text and it will be begging the question to assume that as the basis of the argument. It has also to be borne in mind that the analogy is in any view incomplete, for it has never been suggested that the adoption puts an end to the adoptee's rights or lets in the next heir, in respect of properties acquired by him *by his own exertions.* If on the other

hand, the text of Manu is held to be clear and express that the adoption not only affects his rights of future inheritance in the natural family but divests the adoptee of rights already acquired in the properties of the natural family, the argument founded on the assumed disfavour of the Hindu Law to the divesting of vested rights has little force in it. That such an operation may lead to anomalous or inconvenient consequences, especially in connection with the rights of alienees and of prospective heirs cannot be denied and this consideration seems to have weighed much with the Judicial Committee in *Kerri Kolitani's case* [1]. But such anomalies exist in other branches of the Hindu Law, *Cf.* for instance the effect of an adoption by a Hindu widow on alienations made by her (or by any co-parcener) prior to the adoption, and even as regards the present topic, it seems to be undisputed that the adoption will deprive the adoptee of his right by birth in the ancestral property of the natural family, though his right to a share therein was one that he could have even alienated, prior to the adoption.

Mr. GOLAP CHANDRA SARKAR SASTRI.

(*Examined on interrogatories*).

9. Please translate Manu, Chapter IX, Sloka 141, with the commentary of Medhatithi, and Sloka 142 with the commentaries thereon of Medatithi, Sarvagna Narayana, Kulluka, Raghavananda and Nandana.

Answer :—Manu, Chapter IX, Sloka 141. But if a person's *datrima* son (that is, given son) be endowed with all good qualities, he (the given son) certainly takes his (that person's) property, though received from a different *gotra*.

Commentary of Medhatithi :—In the text (of Manu, Chapter IX, Sloka 185), "neither brothers, nor fathers (that is, father or remoter ancestors) but sons take the father's property"—is predicated the right of all descriptions of sons to take the property (of the legal father); but where there is an *aurasa* son, their right to get maintenance only (is predicated) of the Kshetraja (appointed wife's son) and the like (secondary sons), in the text (of Manu, Chapter IX Sloka 163) "*aurasa* son alone is the master of the paternal wealth, but he must give maintenance to the other descriptions of sons, for the sake of compassion;" hence the right of the *datrima* son to take the property (of the adoptive

1. (1879) I. L. R. 5 C. 776.

father) is certainly established (by the text of Manu, Chapter IX, Sloka 185); but this text (Sloka 141) is intended to provide for (the adopted son's right to the adoptive father's property) even when an *aurasa* son exists ; otherwise no purpose would be served by this text. But what is his share? On this some say equal to that of the *aurasa* (son) by reason of the absence (of specific deduction) of the twentieth part (for the eldest son, Manu, Chapter IX, Sloka 112). This is not reasonable, for if equality had been intended to be laid down, then just as in the topic of appointed daughter, so in this (topic of the given son) also, it would have been declared,—" then the division must be equal"—(Manu, Chapter IX, Sloka 134) ; hence it is asserted (by us) that an inference should be made, of the sixth or eighth or the like share as is provided for the appointed wife's son (Manu, Chapter IX, Sloka 164). As to this also (there) arises the observation (viz.) as a particular share is declared (by Manu for the appointed wife's son in the text—" but the sixth is the share of the appointed wife's son (Manu, Chapter IX, Sloka 164), so also a similar share will be declared for the *datrima* son (Manu, Chapter IX, Sloka 159) ; hence the necessity for the present text on the same subject should be considered. Upadhyaya, however, says,—"From the present text on the same subject and from the absence of any specification of any particular share, this inference is reasonable, that (the given son's share) is less than that of an appointed wife's son, but not absence of any share nor participation of an equal share (with the *aurasa* son), nor equality with the appointed wife's son."

Manu, Chapter IX, Sloka 142 :—" The *datrima* son is not to take (with him when he passes from his family of birth to that of adoption) the *gotra* and the *riktha* of his progenitor, anywhere. *Pinda* is follower of *gotra* and *riktha*, (therefore), the *swadha* (spiritual food) goes away absolutely from the giver."

Medhatithi's Commentary :—(The reading "*tuktam*" in the first line of Medhatithi's comments on this text as given in Mandalik's edition of Manu appears to be incorrect. I think it should be "*yuktam*". For, as it is, the translation of the first sentence would be—" In this text also it is declared that the *datrima* son should get a share (of the adoptive father's property) ; and this must be wrong as it is not declared in the text. I proceed therefore to translate as if there was the word "*yuktam*")

From this (text) also it appears reasonable that the *datrima* son should get a share (of the adoptive father's property), inasmuch as he does not take away the *gotra* and the *riktha* from the progenitor's side by reason of his being gone away from the lineage; and in the absence of his taking the *gotra* and the *riktha* he does not also offer pinda to the progenitor; because the pinda is the follower of the gotra and the riktha, that is, follows the gotra and the riktha, by the gift of oblation of food and the libation of water he performs the exequial rite of him, whose gotra and riktha he takes; "goes away absolutely," that is, ceases with respect to him; (by the term swadha) are indicated "Sradha with offering of pinda" and the like means of offering spiritual food. Alike to it are these two (gotra and riktha, because these two also cease).; he who gives away his own son to another, with respect to him (the rite) ceases,—the meaning is, should not be performed in his honour. This very reasoning applies to the *kritrima* and the like subsidiary sons). The pregnant bride's son and the deserted son and (other) sons of two fathers confer benefit on both (the fathers). Others, however, explain that the word "haret" is to be deemed to have the suppressed causal form equivalent to "harayet." [The word 'harayat' in Mandlik's edition is erroneous, it should be harayet] and accordingly they say (the *datrima* son) should confer benefits on both the fathers as a son of two fathers. (This sentence as well as the rest of the commentary on this text are obscure. But if the word "gamayanti" be changed into "gamayati" then I think, I may decipher its meaning which is as follows). But the subsequent introduction of spiritual benefit (in the second line of the text) indicates the same (that is, the same meaning) in the way (we have put); —if the (adopted) son is not to take the gotra and the riktha, then, however, it must be explained (as we have done). (As regards the meaning put by others by taking "haret" to be equivalent to "harayet"); that, however, is not expressed (in the text), nor is there any proof which can be put forward in support of that other meaning.

Commentary of Sarvagna Narayana.—"Now the datrima son has not in any way connection with the property of the progenitor, —this is declared in the text beginning with *gotra* (that is, in the above text). For this very reason, he is not the son of two fathers, because, he is of the adopter's gotra. But the son begotten by

the husband's younger brother (on a woman according to the old custom of levirate) and the son of the appointed daughter are alone (sons of two fathers)—for they have two fathers. (Follower of Gotra and riktha),—the meaning is in case of identity of gotra and taking of riktha offering of pinda (takes place). Of him who gives his son (in adoption) the "swadha," that is, sraddha to be performed by that son, goes away.

Commentary of Kulluka :—"The dattaka son is never to get the gotra and the riktha connected with the progenitor, and pinda is follower of gotra and riktha, whosesoever gotra and riktha he takes, to him alone he gives pinda. Hence of the progenitor who gives away his son, the swadha, that is, the sraddha with pinda and the like to be performed by that son, ceases."

Commentary of Raghavananda :—There being a doubt whether the datrima son has a connection with his progenitor's gotra, riktha and pinda, or not; the text beginning with gotra (that is, the above text) is declared. "The gotra and the riktha," the word "riktha" here means wealth, (for) Amara, (the lexicographer) (says) "riktha and dhana and vasu are synonyms." These two he does not get, therefore pinda also offered by him does not reach the (natural) father. The reason for this (is) "pinda is follower of gotra and riktha" (that is) is on account of gotra and riktha; of the giver, that is, of the progenitor, the swadha ceases; the words "swadha" is illustrative—the purport is he is not entitled to all the three (*viz.*,) (the gotra, riktha and pinda). Govinda says—since it is declared,—"the ten sons are proclaimed in default of the aurasa and the kshetraja"—therefore the datrima son is entitled to property in default of these two. (But this is not correct), even when these two exist the datrima gets property; otherwise the special rule laid down in the text (141)—"But if a person's datrima son, &c.," would be useless. Therefore says Medhatithi—"But this text is intended to provide for (the datrima son's right to take the adopter's property)—even when an aurasa exist; otherwise, no purpose would be served by it."

Commentary of Nandana :—"The datrima son is not to get, that is, not to appropriate the gotra and the riktha of the progenitor; but he is to take the gotra and the riktha of him to whom he himself is given. The reason for this is declared by the latter half (of the text). "Follower of the gotra and the riktha,—

(what) follows the gotra and the riktha. The meaning is, he who takes the gotra and the riktha is also the giver of the pinda, none else. Hence of the giver, (what is) of the progenitor, the spiritual food (that is) the offering of the pinda, etc. ceases."

It should be observed that this text appears to be differently read by different commentators: Medhatithi appears to read the text with the word "haret," while Nandana with the word "bhajet". It is not, however, clear what reading the other commentators adopt. The word "dadatah" in the above text—I have translated into "from the giver", taking it to be in the ablative case, having regard to the commentary of Medhatithi; but Kulluka takes it to be in the genitive case: the form being the same in both these cases. I have not translated the words "gotra" and "riktha" because there are no English equivalents of them: for gotra means the descent through the father in unbroken male line from an ancient sage or rishi, after whom the gotra is named, or the status of being the son of the father, and riktha means property to which a person's right accrues by reason only of relationship to the owner, which is sometimes improperly translated into heritage. But under the Mithakshara the right of the male issue arises from their birth to the property of the father or other lineal male ancestor in the male line; such property cannot be called heritage; for *nemo est heres viventis*.

It may be observed here that my translation of the above text does not convey its full meaning and effect, which are to be gathered from other texts of that chapter bearing upon the subjects dealt with in this text. The object of this text is to show the change in the status of the boy given in adoption. It should be noticed that the text No. 168, Ch. IX, Manu, shews that a son may be given in adoption either by the father or the mother or both; and this text also applies in a case in which the giver is the mother. The progenitor also is to be taken as illustrative meaning not only the progenitor but also all persons connected through him. The provision relating to the cessation of connection with the progenitor's gotra implies that his relationship with all sagotra persons ceases. It is worthy of special notice that nothing is said by Manu about the connection with maternal relations. The reason appears to be that at Manu's time no importance was attached to cognate relationship. As the Twelve Tables of Rome, so the Code of Manu does not

recognise at all the heritable rights of cognates : nor is there any provision in Manu for offering pindas to maternal ancestors. The texts in which daughter's son and maternal grandfather are mentioned in connection with inheritance and performance of sradha ceremony relate to the putrika-putra or the appointed daughter's son, a kind of subsidiary son. In them the daughter's son occupies the position of either a son or a son's son and the maternal grandfather that of a father or paternal grandfather. The full meaning of this text read in the light of other texts in this chapter bearing on the subject of sonship is that adoption operates as civil death of the boy as regards the family of his birth by putting an end to all secular and spiritual connection of the boy with all natural relations.

10. Please translate also Smrithi Chandrika, Chapter X, paragraphs 12 to 15. Parasara Madhaviya, paragraph 63 beginning with *dattakadinam* etc., and ending with *dadatah*, etc., Dattaka Mimamsa, section VI, paragraphs 6, 7, and 8 and Dattaka Chandrika, S. II, paragraphs 18 & 19.

Answer:—" Hence the devolution of property from a secondary father in the Kali age (relates) only to the (secondary) son called dattaka. On this (subject) Manu (declares),—But of him whose *datrima* son is endowed with all goodqualities, (the son) is certainly to take his riktha though received from a different gotra. (Reading of this text (Manu Chapter IX, 141) is slightly different from that given in Mandalik's Edition, I am referring to the Calcutta Edition of the Smriti Chandrika by Pandit Bharat Chander Siromani, Professor of Smrithi in the Government Sanskrit College, Calcutta 1870. The Calcutta Edition contains "ahare-taib" instead of "saharetaib".) From the word "though" (it appears that the son takes) even when received from a person belonging to a different gotra. In this sloka the meaning of the third foot is thus explained by Devaswamin. " Is certainly to take his entire property and gotra ". Thus it is to be understood that by this very act creating paternity (of the adoptive father) the datrima son's ownership in the property of the adopter as well as the status of being of the same gotra with him, arise ; but it is to be understood that through the extinction of the filial relation from the gift in adoption the extinction of the ownership of the datrima son in the property of the giver and the extinction of the giver's gotra (lineage) take place. With this intention it is declared

by (Manu),—the datrima son is not to take the gotra and the riktha of the progenitor.

Parasara Madhavaiya, para. 63 :—The dattaka and the like do not take the riktha of the progenitor. This is declared by Manu in the text—" The datrima son is not to take the gotra and the riktha of the progenitor; pinda is follower of gotra and riktha; the swadha (spiritual food) goes away absolutely from the giver ". [Manu's text, as quoted here, has " bhajet " instead of " haret " : but the meaning is the same.]

Dattaka Mimamsa, paras. 6, 7 and 8, S. VI:—Manu declares also another rule, *viz.*—" The datrima son is not to take the gotra and the riktha of the progenitor, pinda is follower of gotra and riktha : the swadha (or spiritual food) goes away absolutely from the giver. The datrima son is not to get the progenitor's *gotra* and *riktha* ; likewise *swadha*, that is, *sradha* performed by the son given goes away from the giver of the son ; since *pinda* is follower of the *gotra* and *riktha.* The author of the (Smrithi) Chandrika (says):—" By this (text of Manu) is declared that by the very act creating filial relation, the datrima son's proprietary right in the adopter's property and the status of being of the same gotra with him, arise, but through the extinction of the filial relation from the very act of giving the extinction of the *datrima* son's proprietary right in the property of the giver and the extinction of the giver's *gotra*, " take place.

Dattaka Chandrika, S. II, paras. 18 and 19 :—Likewise Manu (declares)—" The datrima son is not to take the *gotra* and *riktha* of the progenitor : *pinda* is follower of *gotra* and *riktha* ; the *swadha* spiritual food goes away absolutely from the giver." By this (text) it is declared that through the cessation of the filial relation from the very act of giving, the cessation of the *datrima* son's proprietary right in the property of the giver and the cessation of the giver's gotra take place.

I have translated the word " nibritti" used in the Smrithi Chandrika, the Dattaka Mimamsa, and the Dattaka Chandrika into either " extinction " or " cessation ".

11. Please read the translation of the slokas mentioned in question 9 above as given by Sir William Jones, Dr. Burnell and Dr. Buhler and of the passages mentioned in question 10 above as given by Mr. Krishnaswami Aiyar, Dr. Burnell and Dr. Sutherland.

Answer :—As regards Sir William Jones' translation of text No. 141 he has interpolated in his translation words which are not justified by the original text. He has not really translated the text but has construed it and has, in fact, given the meaning put upon the text by Kulluka. He has translated the word "haret" into "shall take" which appears to be misleading, if this phrase conveys the idea of futurity. The conjugation of Bidhiling in "hareta" only indicates an imperative rule but no tense. As regards Sir William Jones' translation of text No. 142, the word "claim" does not appear to be a correct rendering of the word "haret" or "bhajet"; nor are the words "family" and "estate" of "gotra" and "riktha."

As regards Dr. Buhler's translation of text No. 141, the words "shall take" for "hareta" are misleading, as has already been observed.

As regards his translation of text No. 142, the words "shall take" "family" and "estate" are open to objection, as has already been observed. As regards the word "never." I would prefer "nowhere" to it, since the original word "kwachit" primarily conveys the idea of place.

As regards Krishnaswami Iyer's translation of Smriti Chandrika. paras. 12 to 15, I find that in para. 13 he has adopted Sir William Jones' translation of text No. 141, Chapter IX, Manu, omitting the italicised words interpolated by Sir William Jones in his translation from Kulluka's commentary. And so also in para. 15 he has adopted Sir William Jones' translation of the first line of the text No. 142. And I have already stated my opinion with respect to the translation. As regards the last sentence of para. 13 the reading of the book from which he translated appears to be slightly different from the book I have. As regards para. 14, he has not correctly translated the most important part of it; but he only gives what he takes to be the sense of it in his own words. The last sentence of that paragraph, as translated by him, is misleading. The original says—"the cessation of datrima son's proprietary right in the property of the giver—" indicating the extinction of such right existing at the time of adoption. The difference will appear from a comparison of this translation with the literal translation given by me.

Mr. Sutherland in Section IV, para 6, Dattaka Mimamsa, has adopted Sir William Jones' translation of Manu, Chapter IX, 142,

with slight exception. I have already stated my objection to the words "claim", "family" and "estate". Mr. Sutherland has made use of these words in paras. 7 and 8 also.

In para. 18, Section II, Dattaka Chandrika, Mr. Sutherland translates Manu, Chapter IX Sloka 142, in the same manner as in the above passage of Dattaka Mimamsa. In this para. and in the next, the words "claim", "family" and "estate" have been used, and I have already stated my objection to them.

12. Would you accept the translations of all or any of these as correct? If so, state which of them you accept as correct?

Answer :—It is difficult to answer a question like this. I have translated the very same passages and have also given my opinion generally on these translations in answer to previous questions.

* * * *

Cross interrogatories.

4. Are there any words or phrases in these passages used in any peculiar or technical sense? If so, please state such words or phrases, what their ordinary meaning is and their peculiar or technical sense, if any, as used in these passages.

Answer :—The subject itself is a technical one and an ordinary student cannot understand—how can a person cease to be the son of his own father and of his own mother—how can he cease to be brother of his brother, cousin of his cousin—how can his relationship with all his real relations cease? There are many words in these passages used in a peculiar and technical sense. In text No. 141 and No. 142, Manu, Chapter IX, words "datrima", "hareta", and "haret", "riktha" "*gotra*", "*Janaitu*", "*pinda*", "*dadatah*" and "*swadha*" are used in technical senses.

"*Gotra*" primarily means that which protects cows:—Ordinarily the term *gotra* is understood to be the name of a *rishi* from whom a person is descended in an unbroken line of males,—but that meaning is to be taken subject to the fiction of adoption. Then again, it is said that none but Brahmins can have a *gotra* in the sense of being descended from the *rishi* after whom the *gotra* is called : in the case of the Kshatriyas and Vaisyas, it is said that their gotra means the name of some ancester of their Guru: but the Sudras cannot even have such a gotra as they cannot have a Guru or preceptor of the sacred literature, as the study of the shastras is absolutely prohibited to them. In Manu, Chapter IX, 141, the word "gotra"

means collectively all the persons descended in male lines from the founder of the natural father's gotra; the descent is to be taken to be either real or fictional as in the case of adoption; and in Manu, Chapter IX, 142, the word "gotra" means the status of sonship.

As regards the word "datrima" it means "given". None can understand the meaning of the word "datrima" by reading this text. In Manu Chapter VIII, Sloka 415, the word "datrima" means "a kind of slave". "Datrima son" has been defined by Manu in the subsequent text, No. 158, Chap. IX. Before reading that text, it is impossible to understand the meaning of words "datrima son" in texts Nos. 141 and 142. The word "hareta" or "haret" is derived from the root *hri*, which ordinarily means removing a thing without the consent of the owner, stealthily, for the purposes of appropriation. But verbs in Sanskrit are used in various different senses; for instance, from the root are derived the following words: ahar (taking food), "bihar" (walking for pleasure) prahar (beating), and samhar (killing); but the pervading idea appears to be that of removal of something. In the text No. 141 it means acquiring proprietary right (to the property of the adopter): the right is as it were removed from the adoptive father and brought to the adoptive son. Thus there is a connection between this meaning and the ordinary meaning. It may be that this root "hri" and the English word "heir" has some philological connection. It may sometimes be translated into inherit when it is connected with obstructed heritage or "Saprathi-bandha-daya." But in this text it cannot mean inherit, as the proprietary right is acquired from the moment of adoption. In text No. 142, the sentence is a negative one and it means—"is not to take away with him when he is passing from the family of his birth to the family of adoption." It appears that, according to the Laws of Manu, a man's status was determined by the gotra, the riktha and the pinda. He belonged to some gotra or other, he was entitled to some riktha from which he derived his maintenance and he had spiritual connection with some (deceased) persons to whom he offered pinda as being his ancestors. By declaring the cessation of secular and spiritual connection with natural relations indicated by gotra, riktha and pinda, it is intended that he becomes civilly dead to the family of his birth, and the subsequent texts Nos. 158 and 159, Chap. IX,

Manu, shew that the dattaka son acquires connection both secular and spiritual with the family of adoption, inasmuch as he becomes member of the adoptor's gotra, offers pinda to him and his ancestors and takes his property. The intention of the text No. 142 is to state the change that takes place in the status of the boy at the time of adoption. The word "riktha" ordinarily means wealth, but in the Smrithis dealing with the subject of daya-bhaga, it means property to which a person's proprietary right arises by reason only of his relationship to his owner. In some texts it means "aprati-bandha-daya", as in the text of Gautama cited in para 8, S. I, Chap. I, Colebrooke's Mitakshara and explained in para 13 of that section. In these two texts (Nos. 141 and 142, Ch. IX, Manu) it is used in the same sense. The text No. 141 contemplates acquisition of proprietary right to the adopter's riktha from the moment of adoption. And the text No. 142 contemplates that the boy is to lose the proprietary right he had acquired in the property of his natural father from the moment of his birth. The word "Janaitu" in the text No. 142, which means progenitor, includes all relations to whose property the boy might have acquired proprietary right as "apratibandha-daya" or "sapratibandha-daya" for instance, the paternal grand-father or the paternal uncle.

"Pinda" is ordinarily used in various senses other than that in which it is used here (text No. 142), namely, thickness, mass, ball, body, corridor of a house, morsel of food, &c. Here it means food offered to manes of ancestors; but it really stands for the exequial rites in which pinda in this sense is offered.

The word "dadatah" means the giver; but here it stands for all natural relations.

And "swadha", which means spiritual food, stands here for all exequial ceremonies. There are a few words in the commentaries, used in technical senses which need not be mentioned here.

5. (*a*) Does not the Sloka, Manu Chapter IX, 141, refer to partition between an after-born aurasa son and an adopted son?

(*b*) Does not the rikthaharnam mentioned in the said sloka refer to the taking of a share on partition?

Answer.—(*a*) There is nothing in the language of this text showing that it refers to such partition. But some of the commentators have held, having regard to other texts of Manu,

that this text should be construed to refer to a case in which a son is born to the adopter after adoption and consequently partition between the adopted and the begotton sons may take place.

(*b*) This question has been answered by my answer to 5 (*a*) above.

6. (*a*) Are there not two readings of the verb in the first Hemistich of Manu, Sloka Chapter IX, 142 ?

(*b*) Is not the word "Bhajet" in the reading of the said Sloka as quoted in your edition of the Viramitrodaya (page 52, cls. 11 and 12) ?

(*c*) Is your translation of the said sloka as given at page 124 of your edition of the Viramitrodaya, correct ?

(*d*) Is not the reading of the said verb as "Bhajet" accepted by the authors of the Mitakshara and other Nibandha Karas ?

Answer.—(*a*) Yes, some read "bhajet" instead of "haret."

(*b*) Yes.

(*c*) I did not translate the sloka myself, but adopted Colebrook's translation of it as given in his Mitakshara, Chapter I. S. 11, para. 32, subject however to the difference of reading and to the interpretation put upon it by the author of the Viramitrodaya. See preface to my translation of the Viramitrodaya, page XV. I cannot say that it is correct, for, the words "claim," "family" and "estate" are open to the objection already stated. The words "family" and "estate" do not convey accurately the meaning of the original words for which there are no equivalent words in English, and as the word "claim" is an inaccurate rendering of the word "haret."

(*d*) Yes, it is accepted by the author of the Mitakshara and the Parasara "Madhaviya" but not the authors of the Smrithi Chandrika, the Dattaka Mimasa, the Dattaka Chandrika and the Vivada Ratnakara who have adopted the reading "haret."

7. Is not the word "Bhajet" used in the sense of taking share, in Slokas 104, 119, 121, 124, 156, 192 and 200 of Manu IX ?

Answer :—In sloka 104, the word used is not "bhajet" but 'bhajerun" its plural form and bears the sense of division.

In sloka 119, the word means division.

In sloka 121, the word means division.

In sloka 124, the word "bhajerun" appears to mean "take"

In sloka 156, the word "bhajerun" means division.

In sloka 192 also it means partition.

In sloka 200 the word "bhajerun" means simply "taking", but it may also mean divide.

8. (*a*) In Manu IX, 124, are not the words "Bhajet" and "Haret" used synonymously?

(*b*) Does not Nandana in his commentary on Manu use "Haret" and "Bhajet" synonymously?

(*c*) Do not Kulluka Bhatta and the author of the Dattaka Chandrika use or understand the said words in the same sense?

Answer:—(*a*) Yes, in the sense of taking.

(*b*) It is difficult to answer this question without going through the entire commentary of Nandana.

(*c*) See answer to the previous question.

I fail to see the drift of these questions relating to the meanings of the words "bhajet" and "haret". I have already said that in Sanskrit verbs are used in various senses; for instance, this root "bhaja" means primarily a kind of connection between a thing and a person; "Bhakta" "Bhakti" and "Bhajana" are derived from it—meaning respectively devotee, devotion, and prayer; the word Bhaga or partition is also derived from it. The way in which this root has come to signify division is this: it means getting or being entitled to get or taking property, and when this word is connected with two or more persons, it means partition, as being jointly entitled to or jointly getting or jointly taking. And the particular meaning which is to be put upon such words depends upon the other words with which they are connected in the sentence. Because it signifies partition in some sentences, it does not follow that it bears the same sense in all sentences. Even if the reading be "bhajet", in the text No. 142 it can by no means signify divide, because, that meaning is inapplicable to gotra. Hence it must mean either "take" or "have connection with".

9. (*a*) What does the word "Haret" mean?

(*b*) Does it refer taking a share by partition or taking by inheritance, or both?

(*c*) Please translate Slokas 123 and 124 of Manu, Chapter IX.

(*d*) In what sense is the word "Haret" used in the said slokas?

(e) Is not "Haret" used in the sense of "taking on account of his share" in Manu, Chapter IX, 117, 123, 124 and 141?

Answer:—*(a)* Haret primarily means removing a thing without the consent of the owner for the purpose of appropriation. It has already been observed that the root of this verb is used in various senses. In text No. 141, it means "acquires proprietary right to." In text No. 142 it means "take away with him when he is passing from the family of his birth to the family of adoption at the time of adoption.

(b). No.

(c). Manu, Chapter IX, Sloka 123.

One born of the first wife is to take a bull as a specific deduction; the next best bulls other than that (shall be allotted) to those inferior to him on account of their mothers.

Do. Sloka 124.

But the eldest son born of the eldest wife is to take a bull and fifteen cows: then (other sons) are to take the rest according to their mothers: this is the settled rule.

(d) The word "haret" is used in the sense of taking.

(e) Texts Nos. 117, 123 and 124 contemplate partition—hence, what is taken must constitute a part or the share. In sloka 141 it cannot mean taking on account of share so far as the language of the text goes.

10. Does the word "Haret" refer to the future or the past?

Answer:—The conjugation called Bidhiling does not contemplate any time, but having regard to the fact that a Lawgiver lays down rules that are to apply to cases arising afterwards, it may be, as it has been, translated into "shall take". But the futurity thereby implied has reference to the time of promulgation of the law. Therefore, it means that whenever an adoption takes place in future that law will apply. But the term does not mean futurity relatively to the time of adoption. No importance is therefore to be attached to the future tense. It does not refer to the future or the past but to the present, that is to say, the time of adoption.

11. Is it "Nishedhavidhi" directed to a future act?

Answer.—This has been answered by my answer to the previous question.

13. *(a)* What does *Swatwam* occurring in verse 9, S. 6 of the Dattaka Mimamsa and in Dattaka Chandrika, S. 2, para. 19, mean?

(*b*) Does it not mean "a right to the wealth, &c. ?"

Answer.—(*a*). "*Swatvam*" primarily means the quality of a thing which is owned by a person. It is a relative term. A thing becomes "Swa" in relation to a person who is its owner, and "Swatvam" is the quality of the thing importing that it is owned by the person. But it has acquired a secondary meaning, *viz.*, proprietary right or the relation between a thing and a person as property and proprietor. These two meanings are somewhat analogous to the two meanings of the English word 'property,' *viz.*, proprietary right and the thing which is the subject of the proprietary right. This word is correlative of "Swamitwa". It should be observed that three ideas must be present in the mind in order to understand fully the meaning of any of these words, *viz.*, "Swa", "Swamin", "Swatwam" or "Swamitwam", *viz.*, a thing and a person and the relation between them, that is the relation of property and proprietor. Each of these words denotes one idea and connotes the other two. The word "Swa" denotes the thing, the word "Swamin" denotes the person, and each of these words, 'Swatwam' and 'Swamitwam' denotes the relation. The two ideas other than what is denoted are connoted. The word "Swatwam" here (Dattaka Mimamsa, S. 6 para. 8, first sentence) means proprietary right or the relation of property and proprietor between the datrima and the adopter's property, and between the datrima and the giver's property in the second sentence. And in the Dattaka Chandrika S. 2, para. 19 also, it means the proprietary right.

(*b*). Yes, it means existing proprietary right in the giver's property.

*   *   *   *   *

Re-examination.

2. In what sense is the word "bhajet" used in Sloka 59, Chapter X; 70, Chapter IX and 9, Chapter IX, Manu?

Answer.—In Sloka 59, Chapter X, the word "bhajeta" means gets or derives, in Sloka 70, Chapter IX, the word "bhajeta" means have sexual intercourse with, in Sloka 9, of the same chapter, the word "bhajeta" bears the same meaning.

3. As the word "hareth" is used with reference to gotra and riktha in Sloka 142, Chapter IX, Manu, is there any rule that it should have the same signification with reference to riktha as with reference to gotra?

Answer.—Yes, it is the ordinary rule.

4. Do you find such a rule referred to in the Viramitrodaya, Chapter III, Part I, S. VIII, as well as in Mitakshara, Chapter II, S. I placita 33 and 34 ?

Answer.—In the Viramitrodaya there is a reference to such a rule; but not in the Mitakshara.

5. In Sloka 142, Chapter IX, Manu, can you understand the word " haret " to mean divide with reference to gotra.

Answer.—No.

6. Is it possible to understand the word " *haret* " in the sense of divide with reference to *riktha* alone in the compound word *gotra-riktha* governed by the same expression " *naharet* ".

Answer.—No.

7. You said in reply to cross interrogatory, 6a, that there are two readings, *viz.*,—" haret " and " bhajet " in Chapter IX, Manu, Sloka 142 ; how do you account for the double reading in particular, and different readings in works in general ?

Answer.—The difference of reading is to be accounted for by the practice among Pandits of committing to memory much of what they read and of quoting from memory while writing any work.

8. Assuming that the reading is " *bhajet* " and not " *haret* " in Sloka 142, Chapter IX, Manu, can it alter the sense when understood with reference to the *gotra-riktha* ?

Answer.—No.

9. Can " bhajet " (assuming that to be the reading in Sloka 142, Chapter IX, Manu) mean divide when used with reference to gotra ?

Answer.—No.

10. Can it then bear, having regard to the recognised rules of construction and interpretation, a different signification with reference to riktha alone in the compound word gotra-riktha ?

Answer.—No.

11. What is the reason assigned in the second half of Sloka 142, Chapter IX, Manu, for the pinda going away from the giver ?

Answer.—The reason is that inasmuch as the pinda can be offered only by one connected with the gotra and the riktha, and inasmuch as the adopted son ceases to be connected with the

natural father's gotra and riktha, therefore the adopted son ceases to offer pinda to the natural father and other natural relations.

12. Give the meaning of the word "Vyapaiti," having regard to the prefixes "vi" and "apa" added to "eti."

Answer.—I have already translated the word into "goes away absolutely."

13. What is meant by "paitrikum riktham" in Sloka 104, Chapter IX, Manu?

Answer.—Here it means the Estate left by the father.

14. In the above Sloka 104, Chapter IX, Manu, is that which was previously father's property spoken of as "paitrikam riktham" even after his death and descent to his sons?

Answer.—Yes.

15. What is that Sloka in Manu which deals with the cessation or extinction of all proprietary rights and ownership of the datrima son by reason of adoption, in the property of the natural relations?

Answer.—Manu, Chapter IX, Sloka 142, is the only Sloka on the subject.

16. Do the words "Janaitu-riktham" in the said Sloka 142, denote what is father's property or what was father's property, or both?

Answer.—The genitive case in the word "Janaitu" shows the connection of the progenitor with the words "gotra" and "riktha", the expression "Janaitu-riktham" therefore means wealth belonging to the father, whether he be dead or alive.

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19. When does a son born acquire the gotram of his father (the progenitor)? Answer.—From the time of his birth.

20. On adoption, does the boy retain or lose the gotram which has attached to him in his natural family and take the gotram of the adoptor?

Answer.—Before answering this question, I ought to state that the word "gotra" is often translated into "family" "or general family" meaning collectively all persons descended in unbroken lines of males from the Rishi after whom the gotra is named. But in the text No. 142, Chapter IX, Manu, it is used in the sense of sonship or lineage or the status of being the son.

By adoption, the sonship, lineage or the status of being the son of the progenitor ceases or becomes extinguished, and he acquires the gotram in the sense of sonship, lineage or the status of being the son of the adopter.

But the gotram in the other sense may remain unchanged when an adoption is made within the family.

21. As the existing gotra ceases by adoption, does also the existing proprietary right in the riktha of the progenitor cease?

Answer.—Yes, it does by virtue of the said text No. 142. Chapter IX, Manu.

SUMMARY OF ENGLISH CASES.

In re **R. S. Newman, Ltd., Raphael's claim** : (1916) 2 Ch. 309.

Salary and Commission —Distinction—Appointment for fixed term—Appointee to receive fixed salary and commission—Winding up of business before expiry of term—Appointee's right to damages for loss of salary and commission—Maintainability—Appointee getting a new appointment on same salary for rest of term—Effect.

Per *Astbury J.* A person employed by a company for a fixed term at a salary is entitled on its compulsory liquidation during that term to obtain such reasonable damages as he is likely to suffer having regard to his chances of getting other employment. But, where before the expiry of the term, he obtains a new employment carrying the same salary and lasting for the rest of the term, and he is paid his salary up to the time he obtains his new employment, he is not entitled to any damages for loss of salary.

Per *Astbury J,* and the Court of Appeal: There is a distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission. As a general rule no claim can be made for the non-receipt of commission unless the failure to earn the commission has been caused by the wilful Act of the other party. Where, therefore, a person was appointed managing director of a company for a fixed term under an agreement by which he was to receive 5 £ a week by way of salary and he was also entitled to a commission of 5% on gross sales, and before the expiry of the term fixed, the company was wound up by the Court and there was no business upon

which that commission could be earned after the date of the winding up, *held* that the managing director was not entitled to damages for loss of commission.

Catesby v. Burnett: (1916) 2 Ch. 325.

Company—Articles of Association — Construction — Day of election of directors—No election on date fixed—Adjournment of meeting—Adjourned date, date fixed for election within meaning of article.

One of the articles of association of a limited company provided that a member should not be qualified to be elected a director unless written notice of the intention in that behalf was given to the company not less than 14 clear days before the *day of election of directors*. The ordinary general meeting of the company was held on December 10, 1915. Though the meeting of that date was summoned for the purpose, *inter alia*, of electing directors in place of those who were retiring, the election was not proceeded with on that day, but a committee of share-holders was appointed to investigate the affairs of the company and report to a general meeting to be held on March 10, 1916. On February 21, 1916, written notice was given to the company by a share-holder stating that at the adjourned meeting he proposed to move the election of 4 named members as directors. On a question arising as to whether such notice was in compliance with the article above referred to, *held* that it was as the day of election of directors within the meaning of that article was, in the circumstances of the case, not December 10, 1915, the date originally fixed, but March 10, 1916.

In re **Timson Smiles** *v.* **Timson**: (1916) 2 Ch. 368 C. A.

Will — Construction — Principle —" Issue "—" Parent "— Meaning.

Under a bequest of a residuary estate subject to a life interest to five named nephews and nieces with a direction that if any of them should die in the lifetime of the tenant for life leaving lawful " issue," such issue to take the share which his, her, or their deceased " parent " would have taken it living, while, if any of them should die in the lifetime of the tenant for life without leaving " issue " him or her surviving the share of the one so dying

should be divided amongst the survivor or survivors and the "issue" of him, her, or them so dying and leaving issue, *held* that the word "issue" was confined to children.

In re **Smith Prada Vandroy**: (1916) 2 Ch. 368 C. A.

Will—Construction—Principle—"this my will"—Meaning—Instrument called will or testamentary disposition of testator constituted by his will and codicils at date of his death—Tests.

The word "will" has two meanings. In one sense it means all the testamentary documents by which the testator's property is disposed of; another meaning is that it is an instrument called a will irrespective of any codicils which may subsequently be made. All the circumstances of the case should be taken into consideration in deciding which meaning the word has in any particular case. *Held*, that, in the circumstances the expression "this my will" in a will referred not to the particular instrument but to the testamentary disposition constituted by the will and codicils at the date of the death of the testatrix.

Barnett v. Javeri & Co.: (1916) 2 K. B. 390.

Contract—"Sale of goods"—Contract "subject to safe arrival"—No specification of ship by which goods to be carried—Seller's liability—Distinction between such case and one in which ship specified.

Under a contract for the sale "subject to safe arrival" of goods expected to arrive by ship from a foreign country, no particular steamer however being named, the obligation of the seller is to ship the goods or to get them so far under his control that they are put on board some ship or other. The expression "subject to safe arrival" covers only accidents occurring in transit. There is a fundamental difference between such a contract and one which refers to the arrival of goods by a particular steamer.

Where the defendant, who had made a contract for the delivery to himself of certain goods expected by his vendor to arrive from Alexandria, entered into a contract with the plaintiff for the sale to him of the said goods "subject to safe arrival," no ship however being named in the contract as that by which the goods were to arrive; *held*, in an action for damages for non-delivery of the goods, that the defendant was liable as the goods had not been even shipped.

JOTTINGS AND CUTTINGS.

Another legal story.—On circuit at Jedburgh, a counsel rather given to grandiloquence had emphasised a point by telling the jury he pledged his professional reputation on it. At the next town, he was loudly repeating the same pledge when the Lord Justice-Clerk Inglis said drily, "I am afraid, Mr.—, the article you mention is already in pawn at Jedburgh!"—*The Law Students' Journal, November 1, 1916.*

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Lord Moncrieff, though an upright and learned judge, had what Lord Cockburn called "a great inferiority of general knowledge." He did not know even such a simple thing as that gas was conducted to the burners through pipes from a distance. During the trial of an engine driver, in the early days of railways, a fireman witness stated that the prisoner duly whistled on approaching the crossing where the victim was run over and killed. How loud did he whistle? he was asked. "Loud enough to be heard more than half a mile off," replied the witness. "Cockburn did you hear that?" asked Moncrieff, shocked: "Whistling loud enough to be heard half a mile off—the man's perjured!" Cockburn explained that the witness did not mean whistling with his mouth: "they do it with a whistling machine." "I never heard of such a thing!" exclaimed Moncrieff, and then suspecting he was making himself look foolish, he added sulkily, "I'll tell you what it is, Cockburn, ye're most abominably rash to say such a thing!"—*The Law Students' Journal, November 1, 1916.*

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Neutrals and Mediation.—The business of the international lawyer differs very much from that of the politician. The former is concerned simply with the statement of what is, or is not, the law, without fear or favour; the latter must necessarily be guided by considerations of expediency, which may sometimes be dictated by pure sentiment. Looked at from this point of view, the now famous interview in which the Secretary of State for War declared that 'any move in the direction of peace from the United States, the Vatican, or any other neutral would be regarded by this country as an unneutral act,' can be regarded, in its proper light, as a purely political statement. International lawyers, like, Lord Bryce for instance, cannot be expected to assent to the general principle underlying Mr. Lloyd George's

words, that a belligerent may regard an offer of mediation by a neutral as a breach of neutrality according to the time and circumstances under which it is offered. An act cannot become unneutral merely by saying that it is so. International law, in the present case, quite explicitly regulates the rights and duties of the parties concerned. For the Hague Convention on the Pacific Settlement of International Disputes (to which Great Britain and the United States are both parties) provides that a neutral State may offer mediation at any stage in a war, and that such an offer cannot be regarded by any of the belligerents as a breach of neutrality. It is, therefore, not in the power of this or any other country to treat an offer of mediation, if and when it comes, as an unneutral or unfriendly act; for the simple reason that the written and contractual law of nations has given to neutral States a vested and indefeasible right which can no more be taken away by unilateral statements that it does not exist than their right to the inviolability of their territory can be taken away, according to the German method, by simply ignoring or denying it.—*The Law Journal, 7th October, 1916.*

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The Art of Cross-examination.—Time was, no doubt, when the art of cross-examination was less understood at the Bar than it is now. 'You seem to think that the art of cross-examining is to examine crossly,' Baron Alderson remarked to an advocate who was cross-examining with more vigour than skill. The older generation of advocates often proceeded on the assumption that the intimidation of the witness was a short cut to the elucidation of the truth. Even at the Parliamentary Bar, to Judge from Mr. Balfour Browne's recent volume of reminiscences, there were advocates who sometimes forgot that they were gentlemen. Mr. Thomas Hawksley, a distinguished Engineer was being cross-examined by Mr. Merryweather, Q. C.

Mr. Hawksley's face, a clever little face with a clear brow, was drawn to one side whether from an accident or as a congenital conformity I do not know. While he was being cross-examined by Mr. Merryweather [*sic*] he dropped some words which did not reach counsel. 'What was that you said, Mr. Hawksley?' he asked. 'It was not intended for you, Mr. Merry.weather,' said the witness. 'No,' said Merryweather, 'I could see it was said aside.

That was not merely, as Mr. Balfour Browne is content to call it, cruel; it was abominable. The foremost exponents of the cross-examiner's art have usually recognised that courtesy is far more effective than bullying. Of the famous Scarlett it has

been written that 'he would take those he had to examine, as it were, by the hand, make them his friends, enter into conversation with them, encourage them to tell him what would best answer his purpose, and thus secured a victory without appearing to commence a conflict.' The superiority of Scarlett's methods has come generally to be recognised. Sir John Hollams, in his 'Jottings of an old Solicitor,' tells an interesting story of two women. 'fashionably dressed.' and 'very intelligent,' who fraudulently obtained a bill of lading. Bovill, who 'had not the reputation of being a severe cross-examiner, made nothing of one of the two women,' but Ballantine, who was the second counsel for the plaintiffs, 'proceeded to cross-examine the other claimant in a very different manner, and with great severity,' transfixing her with an almost fierce gaze.

> The effect of the cross-examination was marvellous, for in less than a quarter of an hour she fell down flat in the witness-box and could not be further questioned. The result was greatly to prejudice Chief Justice Erle, who, in summing up, said they had witnessed an exhibition of brute force which he had never before seen in a Court of Justice, and hoped never again to witness. In the result the plaintiffs had the verdict, but it was without doubt jeopardised by the extreme severity of the cross-examination.

There, in truth, lies the explanation why, apart from higher considerations, browbeating does not pay. Every jury-box contains twelve possible witnesses at other trials, and they are quick, especially in these days, to resent any unfair use of the cross-examiner's powers.—*The Law Journal, 7th October, 1916.*

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Ill-temper in the Witness-box.—Some twenty five years ago, as the result of Sir Charles Russell's handing of one of the witnesses in the famous *Osborne* case, a loud outcry was raised against what was called 'the abuse of cross-examination.' A long discussion in the *Times*, in which aggrieved witnesses clamoured for protection from their forensic tormentors, was relieved by a lively contribution from Sir Frank Lockwood, narrating an experience of his own in cross-examining a witness at the York Assizes as to the exact position of certain cattle on a road—'beasts' as they call them in Yorkshire. 'Now, my man,' said Lockwood, 'you say you saw these animals clearly from where you stood; how far off can you usually see a beast?' The witness, looking critically at Lockwood across the court, replied, 'Just about as far off as I am from you.' Sir Frank Lockwood's numerous suggestions that advocates stood urgently in need of

protection from witnesses would acquire a more serious turn if the experience of a defending solicitor in a lighting prosecution at Bath on Monday became at all frequent. The charge was made against the manager of one hotel, and the chief witness was a visitor at another. When the defending solicitor asked the titled witness, who is described as 'the Acting Commander of the Royal Naval Reserve and Chief Examining Officer in the Bristol Channel,' whether he had not had a dispute at the hotel against which he was giving evidence, the irate gentleman called him 'a—rascal,' and 'a shirker who ought to be in khaki instead of defending trivial cases,' and when, in reply to this, outburst, the solicitor quietly remarked that he had served the King for seven years, the unappeased witness saw fit to add, 'Yes, as a Volunteer or a dodging special, I expect.' Whether the question that excited the angry passions of the witness was a justifiable one or not we have no means of judging. There is certainly nothing on the face of it to excuse so violent and vulgar a display of ill-temper. The agitated witness even contemplated a physical encounter with the cross-examining solicitor. 'If this had occurred outside I would have boxed your ears,' haughtily remarked the 'Acting Commander of the Royal Naval Reserve and Chief Examining Officer in the Bristol Channel.' Since this exhibition does not appear to have produced any reproof from the magistrates in whose presence it was made some measures ought to be taken to indicate that even gentlemen entrusted with important military duties are not entitled, no matter in what capacity they enter the witness-box, to attempt to browbeat even the humblest 'officer of the Court' in the performance of his duty to his client. One would have said that such language was unknown in an English Court of justice were it not for the recent altercations in Mr. Justice Eve's court. Can it be that the fiery witness in Bath Police Court has been making a special study of those unhappy incidents in the Court of Chancery? The sooner they receive some authoritative censure the better.—*The Law Journal, October 7th* 1916.

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The Retirement of Lord Justice Phillimore.—With the re-opening of the Courts have come a number of judicial changes not wholly unexpected. By the retirement of Lord Justice Phillimore, who has occupied a seat on the Bench for nearly nineteen years, the Court of Appeal loses one of its most learned

and experienced members. Few judges in recent times have possessed a larger or more varied store of legal learning. At the Bar he acquired a leading practice in Admiralty and Ecclesiastical cases; on the Bench, before his promotion to the Court of Appeal three years ago, he was the Judge in Bankruptcy, in addition to taking a successful part in the ordinary work of the King's Bench Courts. He has taken, too, a zealous interest in the work of the International Law Association, and has materially helped to maintain for England a leading place in the still uncertain science of the Law of Nations. The profession while sincerely regretting the passing of so scholarly and courteous a judge from the Royal Courts of Justice, will hope that he will be afforded the opportunity of continuing his judicial work in a higher, sphere.—*The Law Journal. October 14, 1916.*

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Submarines and International Law.— The activities of German submarines off the American coast promise to give rise to an important controversy as to the blockade of neutrals. The Allied Note to neutral States regarding the treatment of submarines in respect of their use of neutral waters is, as it frankly confesses, an invitation to neutrals to accept certain new propositions of law, rather than any declaration of existing law. In effect, it lays down the principle that a submarine is subject to no accepted rules, but is a thing entirely *sui generis*, for which special rules must be made. The accepted principles of neutrality, whereby a belligerent warship is allowed certain facilities for a certain period in neutral ports, subject to the governing idea that the neutral territorial waters must not be made a base of operations in violation of neutrality, is, it is argued, inapplicable to submarines, which, by reason of their elusive nature, are incapable of classification as belligerent warships. Neutral States are accordingly invited to cease to treat them on that footing. The objection which occurs to the international lawer is that this is an extremely two-edged and dangerous argument. It has hitherto formed the basis of the German case for the destruction of vessels at sight. They argued that a submarine was a thing *sui generis*, a new departure in war, and that, therefore, the ordinary rules of visit and search were inapplicable to it. If once the doctrine of *sui generis* is admitted into the law of war, it is obvious that the door is at once opened for the commission of every conceivable llegality. Fortunately, perhaps, for our position in the present

controversy, the American Government has not adopted the view pressed upon it by the Allied Note; so that we are free to deal with the new threat of submarine 'frightfulness' on the old and well-settled lines. On the whole, it seems the safer and the sounder course to continue to insist upon the necessity for the submarine conforming in all ways to the accepted rules of maritime warfare. Only in this way can any adequate check and safeguard be imposed upon its activities.—*The Law Journal, October 14, 1916.*

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Zeppelins as Deodands.—In times which are not so very remote—up to the early Victorian period, in fact—any chattel which was found by the presentment of a jury to be the immediate cause of the death of a person, either by accident or by homicide, was held to be forfeited to the Crown, to be applied as a Deodand to pious uses. This was a branch of the Crown's ordinary revenue consisting of forfeitures for offences, the true reason for such forfeitures, according to Blackstone, being the breach of the social contract under which civil rights are conferred upon individuals in exchange for that degree of actual freedom which every man must sacrifice when he enters into the community. 'If, therefore,' says the great commentator, 'a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privilege as he claims by that contract; and the State may very justly resume that portion of property, or any part of it, which the laws have before assigned to him.' Deodands, it is true, arose from the misfortune rather than the crime of the owner, but they had a sanction older and superior to the *contrat social*, that of holy Church, which founding itself on the Biblical law, 'If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten' (Exodus xxi., 28), claimed all things so forfeited to the Crown to be applied to pious uses and distributed by the high almoner. In course of time these, with other forfeitures, came to be considered as royal franchises, which were granted out to lords of manors 'to the perversion,' as Blackstone says, 'of their original design,' and the odium which attached to the carrying out of the law in this form caused it to be abolished by the statute 9 and 10 Vic., c. 62, which enacted that from the 1st September, 1846, there should be no forfeiture of any chattel 'in respect of the same having moved to or caused the death of

man.' Although, therefore, it is not as deodands that the fallen Zeppelins, with all their appurtenances, can be claimed by the Crown, but rather as enemy property which is liable to forfeiture wherever found, there is a considerable approximation to the original idea in the use which it is proposed to make of a large part of the fabric of the last captured monster. By devoting these Zeppelin relics to the pious use of the Red Cross Fund in the great collection to be made on 'Our Day,' a great charitable as well as national purpose will be served. And so the earlier ideas of the Deodand, the 'gift to God,' find in this new application of the enemy's goods their most appropriate development. *The Law Journal, October 14, 1916.*

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The Non-attendance of Counsel.—Complaint has again been made from the Bench of the non-attendance of counsel in cases in which they have been briefed. In two cases before the Divisional Court on Tuesday the counsel to whom the briefs had been delivered did not appear, and the counsel into whose hands the briefs had at the last moment been put felt themselves unable to address the Court. The Lord Chief Justice did well to censure a practice at once disrespectful to the court and injurious to clients. No member of the Bar, of course, can be in two places at once, but he usually knows when conflicting calls will be made upon his services, and the obvious course for him is to hand over one of his briefs to another barrister in time to enable him to do justice to the client's cause. There are very few members of the Bar who have not fellow practitioners in their own chambers who, provided they are given the necessary time for preparation, are quite capable of conducting the cases to which they themselves are unable to attend. What too many barristers are inclined to do is to keep their briefs in their own hands until the very last moment, hoping that the Court will grant an adjournment. Cases not infrequently occur in which the Court is not unwilling, in order to serve the interests of clients; as well as to suit the convenience of counsel, to adopt that course. The convenient practice has, however, its limits, and counsel do much to imperil its continuance if, in cases in which they can easily entrust their briefs to other members of the Bar, they fail in their obvious duty to do so in good time —*The Law Journal, October 21, 1916.*

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The Return of Fees.—There is a popular notion that a member of the Bar never returns his fees, even though, in the

words of Gilbert, he 'hasn't been there to attend to the case.' The erroneous notion has again found expression in connection with the Lord Chief Justice's recent protest against the absence of counsel. Lord Eldon, in his 'Memoirs,' refers to two eminent members of the Northern Circuit who, having fixed a consultation late at night, were quite incapable of holding' it because they had dined too well at 'Lawyer Fawcett's hospitable table. Young Scott, who was briefed with them, was ordered to make an early departure from the generous board to make himself acquainted with the facts of the case.

> This was hard upon me; but I did go, and there was an attorney from Cumberland, and one from Northumberland, and I do not know how many other persons. Pretty late, in came Jack Lee, as drunk as he could be. 'I cannot consult to-night; I must go to bed,' he exclaimed, and away he went. Then came Sir Thomas Davenport. 'We cannot have a consultation to-night,' shouted Davenport. 'Don't you see how drunk Mr. Scott is? It is impossible to consult.' Poor me! who had scarce had any dinner and lost all my wine—I was so drunk I could not consult! Well, a verdict was given against us, and it was all owing to Lawyer Fawcett's dinner. We moved for a new trial, and I must say, for the honour of the Bar, that these two gentlemen, Jack Lee and Sir Thomas Davenport, paid all the expenses between them of the first trial. It is the only instance I ever knew; but they did.

That is very interesting, not only as a picture of social life in the time of Geoge IV.—it is quoted, indeed by Thackeray in his famous lecture on that monarch—but also as an instance of the advocate's sense of responsibility. Another instance, more directly in point, is afforded by Mr. Atlay's sketch in his 'Victorian Chancellors' of Lord Halsbury's career :—

> His last appearance in Court at the Old Bailey was in November, 1884, under curious circumstances. He had acted as counsel in a probate action arising out of the testamentary dispositions of an eccentric citizen of Leominster. His clients were not only unsuccessful, but were committed for trial on a charge of perjury. Rightly or wrongly, Sir Hardinge Giffard believed that he had not done them full justice in the hearing before Sir James Hannen, and he insisted upon defending them, devoting to the task his whole time and attention during a trial which lasted eight days, and eventually returning his fees.

Upon the death of Mr. Justice Walton a solicitor, in paying a tribute to his memory, mentioned that the late judge had voluntarily returned his fees in an action in which he had briefed him because 'he was not able to give that attention to the case which he thought he might have given.' Sir Edward Clarke and other distinguished leaders of the Bar have, it is well known, made it a rule to return their fees when they have been unable to attend. Not, of course, that there is anything very meritorious in this return of fees which have not been earned. The Bar

Council have, indeed, laid it down as a rule of professional etiquette that a barrister who accepts a brief upon an express understanding that he will personally attend throughout the case ought, if he does not so attend, to return his fee.—*The Law Journal October 28, 1916.*

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Juniors and the Bench.—The compliment which the Lord Chancellor has paid to the Junior Bar by the elevation of Mr. McCardie to the Bench has had no parallel since Lords Selborne made Mr. J. C. Mathew a judge in 1881. Treasury 'devils' have, of course, received their customary reward in the interval in the persons of Mr. A. L. Smith, Mr. R. S. Wright, Mr. Henry Sutton, and Mr. S. A. T. Rowlatt on the Common Law side, and Mr. James Stirling, Mr. Ingle Joyce, Mr. R. J. Parker, and Mr. C. H. Sargant on the Chancery side; but no stuffgownsman of the non-official kind has been deemed worthy of such high preferment. Yet in the not remote past juniors have not infrequently been invited te leap over the heads of the Inner Bar, and, more often than not, with most satisfactory results, so for as the public service was concerned.

The first of the group in the records of the past hundred years is George Sowley Holroyd, declared by his contemporaries to have been 'born with a genius for law.' Lord Eldon made him a Judge of the King's Bench in 1816, and he subsequently shone during twelve years of office as the colleague of Lord Tenterden, C. J. (who himself had never worn a silk gown) Bayley, J., and Littledale, J. He was in his day as great an instructor of legal youth as Tidd or Thomas Chitty, and could point to a roll of forty-seven pupils, with three judges (Hullock, B., Bolland, B., and Cresswell, J.) amongst them. Less distinguished as a judge was George Wood, Baron of the Exchequer from 1807 to 1823, who also owed his promotion to the favour of Lord Eldon. Like Holroyd, J., he had a well-filled pupil room, and taught the mysteries of special pleading to one Lord Chancellor and two Chief Justices—Lords Erskine, Ellenborough, and Tenterden. Beginning his Judicial career at the mature age of sixty-seven, he sat on the Bench for sixteen years. Baron Alderson, Judge of the Common Pleas in 1830 and a Baron of the Exchequer in 1834, was, on the other hand, an infant prodigy; he was only forty-three when Lord Lyndhurst invited him to be the fifth Judge of the Common Pleas. There

was no more learned lawyer in early Victorian times, and he was a poet and humorist to boot.

Bolland, B., had worn his stuff-gown for twenty-eight years when he succeeded Hullock, B., in 1829. Lord Lyndhurst, who was his patron, had been his friend at Trinity College, Cambridge; and Bolland is said to have owed his judgeship rather to this happy chance than to his professional merits. His bust in the library of Trinity College reminds the present generation of his literary tastes, but his judgments are unquoted. Crompton, J., took the place of a promoted 'devil'—Patteson, J. —in 1852. A reporter, like his brother Alderson, he had held also the extinct offices of Tubman and Postman in the Court of Exchequer. James Shaw Willes, appointed a Judge in 1851, was singular in coming to the Bench when there was no Lord Chancellor in existence. The Great Seal was in the hands of Lord Langdale, M. R., Shadwell, V. C., and Rolfe, B., as Commissioners. Forty-seven years of age at the time, he had won fame as editor of 'Smith's Leading Cases,' and had been chosen, by reason of his great erudition and experience, as one of the Common Law Commissioners.

Blackburn, J., afterwards eminent as a Lord of Appeal in Ordinary, was picked out by his countryman, Lord Campbell, in 1859. For the outcry from the Bar and the public which ensued there was, as events showed, no justification. When Mr. James Parke was chosen to succeed Holroyd, J., in 1828 there were, however, no complaints. Yet he had been but fifteen years at the Bar. For twenty-eight years he continued to adorn the pages of Meeson & Welsby, and he was the occasion, on his retirement, for establishing the legal proposition that the Crown by desuetude had lost its power to create life peers. His blood flows in the veins of his grandson, Mr. Justice Ridley. And another ancestor of a future judge who secured the honour of 'silk' was Edward Vaughan Williams (son of the 'divine Serjeant' and father of the Lord-Justice of our own era), Judge of the Common Pleas from 1846 to 1865. Williams, J., was of 'undeniable integrity as a citizen' and had a 'well-deserved reputation as a profound lawyer.' So said the congratulating burgesses of Kidwelly, whose Recorder he was at the time of his elevation. And Sir Roland Vaughan Williams narrowly escaped the fate of his father. A silk gown was thrust upon him

by Lord Halsbury, so that he might serve as Commissioner of Assize a few months before he was promoted. Lord Tenterden, C. J., Richardson, J., Littledale, J., Patteson, J., Wightman, J., Archibald, J., Hannen, J., and Bowen, J., were all stuff-gownsmen who had served Law Officers as 'devils.' These are good names, but a list which includes Alderson, Willes, and Blackburn can compare with any other roll of fame.—*The Law Journal 28th October, 1916.*

CONTEMPORARY LEGAL LITERATURE.

Insurance of enemy property against the acts of the Government of the insurer was for a long time considered not illegal. Lord Mansfield thought it was for the benefit of the country to uphold such contracts. First, he said, it brought in profit to the country in the shape of premiums, secondly, it was a certain mode of obtaining intelligence of enemy designs. This however is no longer the law but the question is still undecided whether a pre-war valid contract of insurance is wholly avoided by the war or is only suspended and any right accruing after the cessation of the war could be enforced and the learned writer in the *Law Quarterly Review for October* on this subject suggests that the latter is the correct view. Another writer in the same Review puts forward the view that under the common law the Crown has power for emergencies of State to seize property of the subjects and that no claim for compensation therefore is admissible against it or its officers. The majority in the court of appeal apparently took this view but as Sir Frederick Pollock observes that the course that the Attorney-General took in the House of Lords of offering compensation suggests that it may not have equally appealed to the House. The argument of the learned writer is that the restrictions placed on the Crown's prerogative as to maintaining a standing army, etc., relate only to peace times and do not cut down the Crown's right to take all necessary steps to protect the country in times of war. No petition of right for compensation would lie against the Crown for compensation because the case would be one of tort and a petition of right lies only in cases of contract and no action would lie against the officers enforcing the orders of the Crown because the acts of the officers would be in obedience to the lawful order of the Crown.

Mr. Herman Cohen puts together the possible and probable references to a legal profession in the literature of England between 1107—1413.

In the *Juridical Review* for March (1916) Mr. Brodie-Jones points out some of the outstanding differences between English and Scots law of contracts. The most important difference of course, is that whereas under the English Law consideration is an essential incident of every contract, under the Scots Law it is not. In Scotland certain contracts require to be in writing but it is open to a party in certain cases even though there is no writing to call upon the other side to deny by his oath the existence of such a contract and if he fails to take the oath, to prove it *aliunde*. But it is open to the courts in their discretion, not to call on the other party to take oath. Under the Scotch practice, written obligations can be registered in court with the consent of the party bound and in the event default execution will issue. Sealing to which so much sacredness is attached in England was dispensed with in Scotland so early as 1584 but two witnesses are necessary for every Scotch deed.

In the same Review, for June Mr. Henry Brown reviews the important Scotch cases of the last century on insanity in relation to crime and lays down the two following propositions as deducible from them.

1. An accused person is entitled to be acquitted on the ground of insanity if it is proved to the satisfaction of the jury that at the time when he committed the criminal act charged he was suffering from an absolute alienation of reason so that

(*a*) he did not know the nature and quality of the act which he was doing ;

(*b*) if he knew its nature and quality he did not know that he was doing what was wrong ; or,

(*c*) if he knew both the nature of the act and that it was wrong, he did not possess will power sufficient to enable him to control his impulse to do it.

2. A person accused of murder may be convicted of the less grave charge of culpable homicide if it is proved to the satisfaction of the jury that at the time when he committed the criminal act he was suffering from unsoundness of mind which did not amount to an absolute alienation of reason.

In the *Canadian Law Times* for September, Professor Edwin Maxey of the University of Nebraska demonstrates the utter illegality internationally of the announcement of Germany and Austria that they would sink without warning all armed merchant vessels of their enemies. A new invention cannot absolve them from the duty imposed by international law of warning before sinking; nor is the fact that submarines cannot sink armed merchant men a ground for taking away the recognised right of merchantmen to arm themselves for purposes of defence. The writer rightly says that if neutral lives are lost by their disregard of the precautions required by the international law, the neutral countries involved are justified in breaking off communications with the erring country.

BOOK REVIEWS.

THE STAMP ACT II OF 1899 WITH NOTES *by K. Jagannadha Aiyar, Third Edition*, 1916.

The legal profession in this country has been for some years looking out for this edition of Mr. Jagannadha Aiyar's well known Commentaries on the Stamp Act. The book under review is one of the very few publications on Stamp Law which give the reader a comprehensive view of the subject and does not stop with giving a bead roll of cases decided under each section of the Act. Analogies of English decisions are frequently invoked and the whole subject has been dealt with from the treatise writer's point of view. Mr. Jagannadha Aiyar's authority on questions of Indian Stamp Law is very high and we have no doubt his expression of opinion on questions not covered by authority will command great respect. There are several appendices to the work containing the prior enactments relating to stamps, the English Statutes on the subject and a large variety of other useful and valuable information. We cannot complete the review of this work without saying that this is a work indispensable to all having to do with questions of stamp.

THE INDIAN DECISIONS (*Old Series*) *Vol.* 17, *Law Printing House, Madras.*

We have great pleasure in announcing the publication of the 17th Volume of the Series which Reprints Part I of Vol. 14 of the Bengal Sudder Dewani Adawlut Reports.

The Madras Law Journal.

PART XXIII.] DECEMBER, 1916. [VOL. XXXI

THE EFFECT OF ADOPTION ON PRE-EXISTING RIGHTS.

(Continued from p. 105.)

Evidence of Mr. Rangacharya taken on Commission.

I translate Manu, Ch. IX, verse 141, as follows:—"But that given (or adopted) son who is possessed of all (good) qualities shall certainly obtain, even though he has come from another *gotra*, the property of him (to whom he is given)." I translate Manu, Ch. IX, Sloka 142 as follows;—"The given (or adopted) son shall in no case obtain the *gotra* and the property of begetter (or natural father); the *pinda* goes along with the *gotra* and the property and the *Swadha* of him who gives (a son in adoption) goes away."

Q.—Is *Dadathaha* in the ablative or genitive case?

A.—I consider it to be in the genitive case. I say it is in the genitive case on account of its connection with the term *Swadha*, a term which serves as a formula to be repeated on occasions when oblations are offered to the *pitris*. Here, however, the term is used to signify the merit or the (*Apoorva*) which accrues to the *Pitru* on the offering of an oblation by his son or sons. Thus *Dadathaha Swadha* would mean the beneficial result which could accrue to the father (who gives), after his death, by the son given away offering oblations to him.

I believe that *sloka* 141 and *sloka* 142 are closely related to one another.

Q.—What is the connection between the two slokas?

A.—In order to make out the connection between these two *slokas*, I believe it is necessary to make out what the commentators on *Smrithi* called the *Avakasa* of a *sloka*, which means the scope for the operation of the rule given in the *sloka*. In connection with *sloka* 141, I agree with Medhatithi in considering that the scope arises on the birth of an *Aurasa* son to the father who had already taken a son in adoption. The

question in such cases is whether the adopted son is entitled to any property of his adoptive father. That this is the scope is borne out, I believe, by the indeclinable particle *Thu* in verse 141, which means *but.* This sloka is intended to give an exception to a general rule according to which when the *aurasa* son is in existence the adopted son cannot obtain any property of his adoptive father. This exception relates to the case of the *aurasa* son born after the adoption of the adopted son. It is said that in this particular case the adopted són is entitled to a share in the property of his adoptive father side by side with the *aurasa* or natural born son. Now naturally it would occur to one why such exception should be made in this particular case. And the next *sloka* satisfies that *Akanksha* or answers that question. In *sloka* 142, it is said that in no case shall an adopted son obtain the *gotra* or the property of his natural father. The reason why the term *Kvachit* is used in *sloka* 142, is to declare emphatically that even in cases like the one contemplated in the previous sloka, the adopted son cannot obtain the gotra or the property of his natural father. If the adopted són could under any circumstances obtain the *gotra* and the property of his natural father, it ought to have been possible for him to revert to the natural father's *gotra* when the need for him in the adoptive family ceased by the birth of an *aurasa* son. *Sloka* 142 declares against such a possibility and bases the declaration on the religious conviction that the *swadha* of the father who gives a son in adoption goes away altogether. That is how I understand the relation between the two *slokas.*

Q.—You referred in your answer to a general rule in accordance with which an adopted són would not be entitled to obtain any property of the adoptive father when there was an *aurasa* son in existence. Are you referring to sloka 163, Ch. IX of Manu?

A.—Ch. IX sl. 163 is one of the *slokas* which lay down that rule.

Q.—Please refer to Medhatithi's commentary on *sloka* 141 of Ch. IX and see if Manu IX, 163, is the verse quoted by Medhatithi as laying down the general rule?

A.—I find that that verse is quoted by Medhatithi in the commentary here. In *sloka* 142 the word *Janayitru* means beggetter or natural father.

Q—Do the words *Janayituhu* and *Dadathaha* in sloka 142 refer to the same person or different persons?

A.—They may refer to the same or different persons; it will be well to take down the reason why I say so. The latter half of the *sloka* makes a general statement of which the former half seems to be a particular application.

Q.—Does the word *Dadathaha* in the last foot of *sloka* 142 refer to and mean any person who gives anything or a father who gives a son?

(*Objected to*).

A.—It only refers to a father who gives his son away but not to any particular father. That is what I meant when I said that the latter half of the *sloka* gives a general rule of which the former half is a particular application.

Q.—Does the word *Janayitru* in the first foot of *sloka* 142, refer to any particular natural father or to the natural father of any son given in adoption? In your answer to the last question you stated that the word *Dadathaha* does not refer to any particular father but to a father who gives a son in adoption. With reference to this answer I wish to know what construction you place upon the word *Janayituhu*.

A.—I do not exactly understand the drift of the question, but I suppose it is intended to make my meaning clear. If you take into consideration the answers given by me to the previous questions, it will come out, as I believe, that *sloka* 142 is intended to show why an adopted son is entitled to inherit property in the family into which he was adopted side by side with an after-born *aurasa* son. The *Janayitru* here refers to the natural father of such an adopted son; while the *Dadathaha* in the latter half of the *sloka* refers to any father who gives away a son in adoption.

Q.—Does the 1st part of *sloka* 142 of Ch. IX contemplate a gift in adoption by the natural father or by somebody else?

(*Question objected to*).

A.—Strictly the term *Janayitru* means only the natural father; more than that I do not know.

Q.—In translating the first sentence of Medhatithi's Commentary on *Sloka* 142, Mr. Golap Chandar Sirkar amends the words *Tooktam* in Mandalik's edition into *Yuktam*. Is the emendation necessary and, if not, what is your translation of the first sentence?

A.—I do not consider the emendation necessary. I understand the first sentence in the commentary to give the summary and the conclusion of the previous *sloka* according to which the adopted son becomes entitled to share in his adoptive father's property even under the peculiar circumstances mentioned by me above. And my translatihn of that first sentence is: "However, from this it has been stated that the adopted son has the title to a share."

Q.—Please translate the passage in Medhatithi's commentary on sloka 142 beginning with *Anyetu* and ending with *Vaktavyam.*

A.—"Others say that *Na Haret* is *Na Harayet* having the *Nich* suppressed within itself, and they say that in consequence as in the case of the *Dwyamushayana* both have to be beneficially served. The latter (half) of the *sloka* here begins (the statement of) the beneficial service. They have it understood thus. When the son shall not obtain the *gotra* and the property there is something to be commented upon and this has not been (so) stated; when another meaning exists, surely it is not necessary to mention a "*Pramana*".

In translating the above passage the misprint *Harayét* is corrected into *Hārayét.* I have noticed the word *Apnuyat* in Kulluka's commentary on sloka 142, in reference to the word *Haret* and have taken it into consideration in my translation of the sloka; *Apnuyat* means "Shall or may obtain." I have noticed the words *Na Prapnoti* in Raghavananda's commentary on the same sloka in dealing with the words *Na Haret.* The words *Na prapnoti* means "does not obtain."

Q.—Please translate the passage of the Dattaka Mimamsa corresponding to placitum 8, S. VI of the Dattaka Mimamsa in Stokes, H. L. Books beginning with *Etena* and ending with *Chandrikakarah.*

A.—"From this it follows that by the very act of bestowing sonship, the adopted son gets "own-ness" in the property

of him who receives (him as son) as well as the capacity to be of his *gotra*. In regard, however, to the property of the giver (the natural father), it is said that, through the cessation of sonship the given (or adopted) son, from the very gift itself ceases to have his "ownness" (in that property) as also the *gotra* of the giver. So says the Chandrikakara ".

Q.—Is the portion you have just translated in effect a commentary upon verse 142, Ch. IX, Manu, quoted in placitum 8, Sec. VI of Dattaka Mimamsa (S.H.L. Books).

A.—Yes, I think so.

Q.—Does the word *Swatvam* which you have translated as "ownness" standing by itself refer to complete ownership or incomplete ownership. (Witness wishes to know the meaning of the expressions, "Complete ownership" and "incomplete ownership".

Q.—This text declares that *Swatva* ceases in certain cases. Will the right of a son to inherit the self-acquired property of the father upon the latter's death, be comprehended within the term *Swatvam*?

(*Mr. V. Krishnaswami Iyer objects to the question*).

A.—Although I am not sure I have quite comprehended the question, I believe it is to know why I have translated *Swatva* as "ownness" rather than as "ownership" or "proprietary right". "Ownness" though somewhat peculiar in English comes nearer to the Sanskrit *Swatva* and does not exactly mean the same thing as ownership. There may be own-ness in relation to a property of which I am not yet owner. If such cases are implied by incomplete ownership, I believe *Swatva* includes both complete and incomplete ownership. In the latter part of the question there is a point of law involved on which I do not want to risk an opinion.

Q.—Would the present right of a son to a share in joint family property with his father be included in the term *Swatvam*?

A.—Yes, I think so.

Q.—Does the passage you have translated from Dattaka Mimamsa, refer to a case in which the natural father is alive or to other cases?

A.—That passage being chiefly based on Manu IX, 142, I believe it contemplates a case in which the natural father is the giver of the son. The passage in the Dattaka Chandrika beginning with *Datri Dhane* and ending with *Bhavateetyuchyate* and corresponding to the last portion of placitum 25 of Sec. III of the Dattaka Chandrika (S. H. L. Books) is the same as a portion of the passage, I have translated from the Dattaka Mimamsa. The language of the original Smriti Chandrika beginning with *Datridhane* and ending with *Bhavatiti* is almost exactly the same as the language of the passage from the Dattaka Chandrika and the Dattaka Mimamsa referred to above.

Q.—Please translate Sl. 201, Ch. IX, Manu.

A.—I accept the translation given by Buhler in the Sacred Books of the East, Vol. (25) as correct.

Q.—Please translate the quotation from Narada in the Mitakshara commentary on Yagnyavalkya *Adhyaya* II, Sl. 140.

A.—I translate it thus: "The hater of the father, outcaste, the eunuch, and he who has committed an *Upapathaka* sin, these shall not obtain a share even though they are *aurasas*. How (then) shall the *Kshetraja* (obtain) ?"

Q.—Please translate Mitakshara, Ch. II. Sec. X, pl. 6.

A.—"In the case of these the incapacity to obtain the share is appropriate only when the (disabling) defect has come to be before division. It does not however hold true in the case of one who is already divided ?

Q.—Is there any difference in meaning between *Labheran* used in the text of Narada referred to above and the word *Haret* used in Manu, Ch. IX, Sl. 142, beyond the difference of plural and singular ?

A.—The meaning implied by the 2 words is the same.

Q.—Do you lay any stress on the word "implied" in your previous answer ?

A.—I have used "implied" in the sense of "denoted".

The words *Labheran* and *Haret* are both *Vidhiling* form and are used in the imperative mood.

Q.—Please translate the quotation from Vriddha Manu in the Mitakshara commentary on Yagnyavalkya, Ch. II, S. 136

(beginning with *Aputra* and ending with *Labhetcheti* corresponding to S. H. L. Books. Mitakshara, Ch. II, Sec. I. Pl. 6.

A.—"A sonless widow who is keeping her husband's bed unsullied and is preserving in the vow (of asceticism), shall present his funeral oblation and obtain the whole share (of his property)." The word translated as "shall obtain" is *Labhet.* I do not see any difference in meaning between *Labhet* as used here and the word *Haret* in Sloka 142, Ch. 9, Manu.

Q.—Mr. Golab Chandra Sircar states in his evidence thus; "That adoption operates as civil death of the boy as regards the family of his birth by putting an end to all secular and spiritual connection of the boy with all natural relations."

A.—I have not made a special and complete study of the Hindu Dharmasastras. But even my limited knowledge here makes me feel that Mr. G. C. Sirkar has gone too far in his opinion in regard to the effect of adoption.

The effect of adoption is different from that of *Sanyasa.* In this latter case the effect amounts to civil death. In the former case there is only a modification of secular and spiritual rights and relations. The rules regarding *Asaucha* and restraint upon marriageable relations and the burden of performing funeral obsequies, as these affect an adopted son, go, as I believe, to prove my position.

Q.—In what way do these affect an adopted son?

A.—I have not now in my mind the details bearing upon the question as they are found in our Smritis. Generally speaking, I remember that an adopted son has to observe restrictions in regard to the choice of a bride for marriage both in relation to the family of his birth and that of his adoption. In regard to *Asaucha,* he is similarly related to both the families. He has to observe *Asaucha* on certain deaths occurring in his natural family in the same way in which certain members of his natural family have to observe on his death, although the adoption in his case is to a *gotra* different from that of his natural father. As to obsequies, the burden of performing the funeral obsequies is entirely taken away from the *Sanyasi* while in the case of the adopted son such complete freedom is not noticeable in reference to the natural family.

Q.—Mr. Sirkar says that the word *Janayituh* in Manu, Ch. IX, S. 142, which means the 'natural father' includes all relations to whose property the boy might have acquired proprietary right. Is this correct?

A.—It perhaps does so inferentially, but as I have already pointed out, the word *Janayitri* strictly means begetter or natural father.

Note.—Mr. Krishnaswami Iyer admits that Sl. 142, Ch. IX, Manu, as quoted in p. 43, l. 8, of Mandlik's Vyavaharamayukha and in the Mitakshara commentary on Yagnyavalkya by G. C. Sirkar, (Part II, Ch. II, S. 18, para. III) contains the word *Bhajet* instead of *Haret*.

Q.—Does the prohibition contained in the first half of Sloka 142, Ch. IX Manu, relate according to rules of interpretation to something which is to happen after the adoption or which has happened before the adoption?

(*Objected to.*)

A.—As I said before, the word *Haret* is in the imperative mood and *Na Haret* therefore gives a negative command. And I believe it holds true in every language that what is commanded by the verb of command becomes applicable to the subject thereof, *viz.*, the given son, only after the act of gift or adoption. That is in accordance with what I understand to be the correct rules of verbal interpretation, *Sabda Bodha*. (Mr. Sivaswami Iyer says that the question has not been fully answered, but the witness says he thinks he has answered the question).

Q.—According to rules of interpretation, is the *Haranam* which is prohibited in S. 142, Ch. IX (M), the *Haranam* which has taken place before the adoption or that which is to take place after the adoption?

(*Objected to.*)

A.—My answer to the previous question brings out, I believe, that it refers to the *Haranam* which is to take place after the adoption.

* * * *

(*Cross-Examination by Mr. V. Krishnaswami Iyer.*)

Q.—To your knowledge is there any sloka of Manu other than sloka 143 of Chapter IX, or any other Smrithi writer, relating to the rights of the adopted son in the natural family?

A.—Just now I am not aware of any. I do not think I have come across any Sloka of the kind since I began to think about these passages recently.

Q.—If the adopted son has no right to the property of his mother in the natural family at the time of the adoption, how would you understand the term *Janayituh* ?

A.—I understand this question to be similar to another which was put to me by Mr. Sivaswami Iyer yesterday. And my answer is the same as I gave to him, that the term *Janayitru* in the passage strictly, *i. e.*, apart from all implications, means the natural father. What it may mean by implication I feel I am no authority on. If the adopted son had no right to the property of his mother in the natural family, and if such a rule were based upon verse 142, Ch. IX, Manu, then that rule would by implication interpret *Janayitru* to include the mother also.

Q.—If the adopted son be not entitled to the property of any other member in the natural family and if that rule is based upon this text of Manu, would not *Janayitru* stand for the natural family ?

A.—I believe it ought to. And I am not aware of any other text dealing with this question.

Q.—If there be a grandson and a grandfather in an undivided family and the grandson is given away in adoption by his mother, and such adopted boy does not take any interest in the property of the natural family, would you understand *Janayitru* to include the grandfather ?

A.—The previous condition that this decision is based upon this text being granted, I believe the word *Janayitru* must in this case be made to include the grandfather also.

Q.—You would give a similar answer if it were uncle and nephew.

A.—If a similar question were put in relation to an uncle and nephew, I would give a similar answer.

Q.—Is there a rule of the Poorva Mimamsa that the *Linga* or gender of the *Uddesya* (that in relation to whom or which something is commanded) is not material and a word in the masculine gender would in consequence include the feminine gender ?

A.—I believe it is so in all cases where the *Uddesya* itself is generally applicable both to man and woman.

Q.—Is that rule that the masculine includes the feminine found in the sixth Adhyaya, first para, third Adhikarana of Jaimini's Nayamalavistara ?

A.—Yes.

Q.—Is that rule relied on in Chapter 2nd, S. 10, Placitum 8 of Mitakshara (Stokes' Hindu Law Books) corresponding to the Mitakshara commentary on Yagnyavalkya, Sloka 140, Chapter II ?

A.—Yes.

Q.—Having regard to the rule of interpretation referred to, *Janayitru* in Sloka 142, Chap. 9, Manu, would include a woman ?

A.—According to that rule such interpretation would be appropriate.

Q.—When does a person acquire his *gotra* ?

A.—There seems to be much difference of opinion on the question. Some hold that a man is born with his *gotra*. It is declared in some Dharmasastra works that a girl for the first time obtains her *gotra* only after marriage and that till marriage she is as it were of no *gotra*. In regard to boys the *Upanayana* is held to confirm the title to the *gotra*.

This, I understand, to be the reason why the adoption of an *Anupanita* is considered good by the Smritis. But, as I said before, our Smrithi law givers do not seem to be unanimous and emphatic in regard to the above rule about boys.

Q.—If a boy dies before Upanayana, are his funeral obsequies performed in the *gotra* of the family of his birth ?

A.—I have no knowledge of the details as to how these things are performed, but I believe that they are performed in a manner in which *his birth in a particular gotra* is distinctly recognised.

Q.—In marriage, is a girl given as belonging to a particular gotra ?

A.—When a girl is given in marriage she is so given, it being recognised that she is born in a particular gotra.

Q.—In marriage does not the girl pass from one gotra to another ?

A.—It is often said that in marriage there is *Gotrantara-pravesa* in the case of a girl. But about that, as I said before, there seems to be difference of opinion. I cannot name any author or give any reference with reference to my answer here.

I have not myself fully investigated the question. I mean that certain Nibandanakaras and that certain Pandits speak of a *Gotrantarapravesa.*

Q.—So far as Manu is concerned, is it not his view that *gotra* is acquired by birth?

A.—I am not sure.

Q.—Do not the words *Sampraptopyanya gotratah* in Sloka 141, Chapter IX, Manu, indicate that according to his opinion *gotra* is acquired before *Upanayana* having regard to the fact that adoption must take place before Upanayana?

A.—They need not necessarily indicate it.

Q.—How do you say that?

A.—The words mean "even though he has come from another *gotra*". According to Manu every *Dwija* boy is necessarily born in a gotra. And since there may be adoption from a family of the same *gotra* or from another of a different gotra to a third family, the adopted boy coming from another *gotra* need not necessarily indicate that he himself has this *gotra*; what is necessarily implied is that the family in which he is born is of a gotra which is different from that into which he is adopted. The adoption of a boy of the same *gotra* is considered better than the adoption of a boy of a different *gotra* and the adoption of such a boy is recommended before *Upanayana*, Manu says that the girl to be married should be *Pituhu Asagotra* in relation to the bridegroom (Sloka 5, Chapter III, Manu).

Q.—Does not the use of the word *Asagotra* imply that the girl to be married has a *gotra* of her own?

A.—Literally interpreted it does. But I know that those who hold that a girl has no *gotra* before marriage interpret *Asagotra* as *Asagotraja.* Here also I cannot name any author or give any reference as to this latter interpretation.

Q.—Even though *Upanayanam* has not been performed, does not a boy acquire a *gotra* on adoption?

A.—On adoption in the case of a boy there is said to be, as in the case of a girl on marriage, a *Gotraantara pravesa.* Whether this *Gotraantara pravesa* gives the adopted boy the *gotra* into which he is adopted, or whether it confers on him merely the title to belong to his gotra, is a point about which, I believe, there is difference of opinion. In this case also, I am not now in a position to quote authority.

Q.—Does not Manu at any rate, in Sloka 142, Chapter IX, declare that on adoption he acquires the *gotra* of the new family?

A.—I believe the Sloka does not say that he acquires it either merely on adoption or immediately after adoption.

Q.—Is it not the necessary inference?

A.—Such an inference may or may not be drawn.

Q.—Do you understand a person having a *gotra* to mean something different from his being born in a *gotra*?

A.—As I said before there are really two different views as to how a man takes his *gotra*. According to those who believe that a man gets his *gotra* by his birth there is no difference. While according to the others, who believe that the actual acquisition of the *gotra* results either from *Upanayana* or from *Vivaha* there is a difference. And I am inclined to believe in the latter view.

Q.—Is there anything in Manu to support this latter view?

A.—I was given to understand that my main business in this examination was in connection with the interpretation of Sanskrit passages, and not having known beforehand the lines on which I was to be cross-examined. I have not come prepared to quote chapter and verse for the various general opinions that have been in my mind in regard to the various points I have been cross-examined upon. I have therefore again to say that I cannot quote authorities. I cannot quote the authorities that support my view. I am bound according to rules of interpretation to understand *Haret* in the same sense both in reference to *gotra* and *riktha* which form the common object of the verb *Haret*.

Q.—If the correct view be that a *gotra* is acquired on birth, would you still adhere to your translation of *Haret* into "obtain."

A.—Yes, I would still adhere *Haret* is translatable into "take" or "carry."

Q.—How would you maintain that your translation is correct on the view that *gotra* arises on birth?

A.—The reason for my interpreting *Haret* as "shall obtain." I have given already in the explanation I gave as to the *Avakasa* of Slokas 141 and 142 of Manu, Chapter IX. I have there pointed out that Sloka 142 seems to contemplate the possibility of an adopted son trying to revert to his natural family and asserting special circumstances and in the way of contradicting such a possibility this Sloka says that the son who has been given away shall in no case obtain the *gotra* of his natural father. That being my

idea regarding the *Avakasa* of these two Slokas, I believe "obtain" is intelligible and appropriate, seeing that the adopted son has now to obtain what he had lost by adoption. "Shall obtain in no case" includes "re-obtaining" also.

Q.—Is there any other *sloka* before or after this that says that the adopted son loses *gotra* or *riktha*?

A.—I am not aware of any.

Q.—Assuming that the *gotra* arises on birth, your translation of *Haret* into "shall obtain" as regards *gotra* can be maintained only by understanding it as meaning "re-obtain"?

A.—I have not translated *Haret* into "shall obtain" on that supposition. But my translation on such a supposition cannot be maintained without taking the expression "shall in no case obtain" to mean "shall not re-obtain" as applied to this particular case.

Q.—On the view that *gotra* arises on birth, is it not the fact that you would have to understand "obtain" to mean "obtain" with reference to *Riktha* also according to the rule of interpretation which you accepted that the word *Haret* should be understood in the same sense with reference to both the objects *Gotra* and *Riktha*?

A.—In this question the idea that property also comes by birth is involved; if that be so, the suggested interpretation would be right in strict accordance with the Sloka of Manu.

Q.—If one obtains the *gotra* of his natural family before adoption and before *Upanayanam*, would not "obtain" in your translation have to be understood as "re-obtain"?

A.—I do not see how this question differs from the previous one. And my answer therefore is "Yes"?

Q.—If that be so with respect to *Riktha* or property acquired before adoption in the natural family, would it not be necessary to understand "obtain" as meaning "re-obtain"?

A.—Yes, I think so.

Q.—Is it not the fact that even though the father may be dead the property that may be divided any time after the death of the father may be described as *Paitrika Rikthum* (father's property)?

A.—Although *Paitrika Rikthum* literally means property belonging to the father, it is very commonly used to mean the

property of any ancestor or ancestors. Therefore I answer "Yes" to this question.

Q.—In Sloka 104, Manu Ch. IX, does *Paitrika Rikthām* mean property which at the time of division belongs to the father or any other ancestor or which simply belonged before?

A.—If property cannot belong to a dead person, the property which is intended to be divided according to this *Sloka* is property which must have belonged to an ancestor, though it is expressly stated here that such property must have originally belonged to the father or the mother. The expression *Paitrika Dravya* in Sloka 209, Ch. IX, Manu means I believe the same thing as *Paitrika Riktha* in Sloka 104, Ch. IX, Manu, and what I said with regard to *Paitrika Riktha* would also apply to *Paitrika Dravya* referred to above and to *Pitriya Vasu* in Sloka 163, Ch. IX, Manu.

In Sloka 146, Ch. IX, Manu, property spoken of as *Bhratur-dhanam* is the property of a brother who must have died previously. Athough the brother is dead his property is spoken of in the Sloka as brother's property. In Sloka 136, Adhyaya II, Yagnavalkya, property which belongs to a man before his death is spoken of as his property even after his death.

Q.—In Sloka 142, Ch. IX, Manu, although the *Janayitru* mentioned there may be dead at the time of the adoption, is the property which belonged to him before his death described as *Janayituh Rikthām*?

A.—Yes, I think so. In general terms, property which belonged to any person before his or her death is often spoken of in the Smrithis as his or her property. It is difficult to give the exact etymological significance of the root "*Hru*" inasmuch, as even in the list of verbal roots given by Panini, the meaning of this particular root is given by means of the word derived from the root itself. "Swadha" is understood to mean by certain commentators and lexicographers the *Sraddha or Pindapradanam*. Commentators have so understood "Swadha" as used in Sloka 142, Ch. IX, Manu. I have not based my interpretation of "Swadha" in this Sloka on any authority so much as on my own reasoning. I do not know if my interpretation of "Swadha" is found in any dictionary.

Q.—If your interpretation of "Swadha" were correct, would it not involve the consequence that the "Pinda" or the "Sraddha"

might be offered even after the adoption, but the *Apurva* would not be generated ?

A.—I do not see how it would.

Q.—According to your interpretation, there is no statement in the text as to whether "*Pinda*" and *Sraddha* are or are not offered by the adopted son to the manes in the natural family ?

A.—*Gotra Rikthanugah Pindah* is distinct on the point.

Q.—The words *Gotra Rikthanugah Pindah* do not say anything more than that *gotra* and *riktha* follow the *Pinda*. It is your position that those words say that the *Pinda* goes away ?

A.—My idea is that the duty of the son to offer the *Pinda* is logically dependent upon his right to the gotra and the property; when the latter ceases the former also goes.

Q.—Is it not a fact that an adopted son has under no circumstances to offer the *Pinda* to the members of his natural family ?

A.—According to this Sloka he has not. *Na kvachit* may mean in no place, in no case, or never. The word *Haret* in Sloka 141, Ch. IX, Manu if interpreted as meaning "shall take" is not wrong but will be ambiguous inasmuch as such a rendering may imply the idea of "carrying."

There are four *Samskaras* before Upanayana namely *Jatakarana, Namakarana, Annaprasana and Choula.* Jatakarana is performed immediately after the child is born. All these *Samskaras* are performed to the boy as born in the *gotra* of his father. I do not know that each subsequent *Samskaram* strengthens the tie of the boy to his natural family, and if so, how far. I said that *Uapanayanam* confirmed the boy in the gotra in which he was born.

Q.—I take it from that that the boy had the *gotra* before Upanayanam and that Upanayanam only tends to strengthen the connection of the boy with the *gotra* ?

A.—The Smrithi law does not contemplate the case of a person who having been born in a *Dwija* family can be altogether *gotra*-less.

The division of the compound word *Sagotrah* is *Samanah gotrah-yasya sah* which means "he who has the same *gotra* as another." An *anupanitha* (*i. e.*, a person whose *Upanayanam*

has not been performed), does not come within the rule that *sagotras* are entitled to inherit.

Q.—Assuming that *Upanayanam* has not been performed at the time of the adoption, does a boy according to Sloka 142, Ch. IX, Manu, lose his *Gotrajatwa* (*i. e.*, his being born of the *gotra* of his natural family) ?

A.—If I understand this question aright my answer is that the incident of his adoption cannot contradict the fact of his having been born in the *gotra* of his natural father.

Q.—So you say even after adoption such a boy is the *Gotraja* of that family ?

A.—I believe so.

Q.—Does it not follow that according to your interpretation of when *gotra* attaches to a man, an adopted son whose *Upanayanam* was not performed in his natural family being still a *gotraja* in his natural family, may still inherit to the members of his natural family ?

A.—The incident of adoption seems however to counteract the title to inheritance on the basis of *Gotrajatwa*.

Q.—Does not Sloka 142, Ch. IX, Manu say that the adopted boy is not entitled to take the property of his natural family by reason of the fact of his ceasing to be a gotraja of his natural family ?

A.—I believe I have answered this question already that adoption seems from this Sloka to contradict the title of the adopted son to inherit the property of his natural family on the ground of his being a *gotraja* thereof.

I have seen three telugu editions, one grandha edition, and two devanagara editions of Manu. They all give the reading *Haret* in Sloka 142 Ch. IX, Manu. Our Pundits are in the habit of quoting from memory even in writing books and commentaries. In consequence of this practice, slight misquotations with slight variations of several kinds are possible and do occur. From my knowledge of *Nibandhana* treatises, such practice on the part of the pundits and such possibility of such misquotations seem to have occurred for long in the history of the development of Smrithi literature. According to that Sloka 142 Ch. IX Manu it is not possible to make out how the giving away of a son in adoption takes away the title of others to offer *Pinda* to the giver of that

son in adoption. The title of the offerer of the *pinda* to offer it is correlative to the title of the particular *Pitri* to receive such an offering.

Q.—With reference to the *Avakasa* of Sloka 142, may it not be that having stated that the adopted son is certainly to take property in the adoptive family, the question is raised whether he is to have the property of both families?

A.—The reason why I prefer my idea of what the *Avakasa* here is to what has been suggested in this question is this. I believe the Smrithi law does not concern itself so much with the giving of a superfluity of advantage as with the correction of what is apt to be inequitable. My reason for that belief is the general impression left in my mind by the tendency of the Smrithi law so far as I have been acquainted with it.

In Sarvagnanaryana's commentary on Sloka 142, Ch. IX, Manu, it is said that the *Sloka* states that the adopted son has no relation *Sambandha* with the property of the natural father. Raghavananda also uses the term *Sambandha* similarly in commenting on this Sloka. In the first line of Medhatithi's commenntary on Sloka 142, Ch. IX, Manu, the terms *Itaha* and *Thataha* are correlated. The words *Itascha* in the first line of this commentary mean 'for this (reason) also". The *Cha* "also" implies that Sloka 142 gives a reason in addition to what Medhatithi has stated in his commentary on the immediately preceding Sloka for the adopted son obtaining a share in the property of the adoptive family.

Q.—From this interpretation of this passage would it not be more correct to have *Yuktam*, instead of (*tu-uktum*).

A.—I have already said that the passage makes sense well enough without the suggested alteration. The alteration may perhaps make the point clearer, Taking *Tu-uktam* and *Yuktam* misprinting the one for the other in Devanagari characters is very possible. Taking the reading *Tu-uktam* I take it that *Tu* and *Twa* do not necessarily conflict with each other.

Q.—Is not the passage in Medhatithi's commentary on Sloka 142, Ch. IX, Manu beginning with *Uttarastu* and ending with *Vaktavyam* which you have already translated, obscure?

A.—It is not easily intelligible, but it is not so obscure as to be untranslatable.

Q.—What is the purport of your translation of that passage?

A.—To explain the purport of the portion translated I must state briefly what precedes it. The idea is that by taking the *Haret* as a " submerged " causal form, the adopted son is called upon not to allow anybody other than himself to inherit the property of his natural father, and the latter half of the sloka is, on this ground, supposed to give the reason why the adopted son should do so. If the adopted son does not inherit the *gotra* and *riktha*, it is held that he cannot offer the Pinda. And to let the dead father go without the offering of the Pinda is not permissible. Therefore *i.e.*, because the *Swadha* of the giver thus goes away, the given away son must inherit the *gotra* and *riktha* of his natural father. But on the above supposition of the submerged causal form, the given-away son has to inherit the *gotra* and the property of his natural father. That he does not so inherit them is not mentioned in this sloka. Now comes the portion which is perhaps even more obscure than what I have already explained. It may be asked what authority *Pramana* there is for bestowing this title to inherit the *gotra* and *riktha* of the natural father on the given-away son ?. And the answer to such a question is that such an authority is not wanted when there is this other meaning to the sloka itself. The whole passage beginning with *Anyetu* takes a view which Medhatithi does not accept. I attach no legal meaning to the word *inherit* in this explanation and I do not know what such legal meaning is.

The word *Amsa* in Sloka 201, Ch. IX, Manu, which I have translated as *share* may mean a part or the whole according to circumstances. The meaning " have or possess " may be one of the dictionary meanings of *Labhet* and its plural form, but I do not know how those forms can be so used nor do I remember any passage in which they are so used. The words *Prapnuyat* and *Apnuyat* cannot have the meaning " have " according to me. That may be one of the dictionary meanings of those words. *Swa* when used as a noun in the neuter gender means property; *Swatva* which I have translated as " ownness " is an abstract noun derived from the pronominal *Swam*, *Swaha* as a pronoun means a man's own. It does mean sometimes, " also one's own self ". How we have to interpret the word depends upon the context. *Swatva* may also be derived from *Swa* meaning property. I do not believe how it can be easily made to mean proprietary

right when dictionaries say that *Swatva* means ownership or proprietary right. I do not mean to hold that they are wrong, but I am inclined that they give a forced meaning which is therefore inaccurate. And if dictionaries do not give the meaning "ownness", I do not believe they are wrong in omitting that meaning because the term ownness though easily intelligible is uncommon in English. And if the dictionaries do not give any meaning corresponding to ownness, I am convinced that they must be deemed to be incomplete. I am prepared to accept (यथेच्छाविनियोगयोग्यत्व) as an interpretation of *Swatva* when it means the quality of being property. But in the sense in which I have translated *Swatva* as derived from the pronominal *Swa* that definition is not applicable. To coin another strange word, the given definition defines what may be mentioned as 'propertiness', (यथेच्छाविनियोगयोग्यत्व) may be translated as " the fitness to be used or spent in the way (one) likes. "

Q.—Have you any authority for understanding the word *Swatva* in the passages you have translated as not derived from the neuter nominal *Swa* but as derived from the pronominal *Swa*.

A.—My authority is the context; in the context the *Swatva* of the given-away son in the *Dhana* of the giver is what is spoken of. It is not the "propertiness" of any property that is under discussion but what is under discussion is " whose own the giver's property has to be ". The sense of ownership or proprietary right of the word *Swatva* in relation to *Dhana* in the natural family would quite fit in with the context but would not be quite so accurate and would not convey exactly the same meaning. I mean it would not be quite so accurate only in the sense that it would not convey my meaning which I consider to be the more accurate of the two. When I said that Sloka 141, Ch. IX, Manu, was a statement of an exception to a general rule contained in Sloka 163, Ch. IX, Manu, and elsewhere, I had not in my mind any other explicit statement of the same rule in Manu. But I know that is impliedly taken for granted in more than one place in Manu, although I cannot now quote chapter and verse.

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Re-examination.

* * * *

Q.—If the period of pollution for a person dying before *Upanayanam* were the normal period of ten days, would this

circumstance throw any light on your view that a man is confirmed in his gotra by *Upanayanam.*

A.—It goes to strengthen my view.

Q.—With reference to your answer that when a girl is given in marriage it is recognised that she is born in a particular gotra, please translate the passage at page 12 of *Smartanukramanika* edited by Parvatam Narashimha Sastri now put into your hands ?

A.—I translate the passage thus. They go to the giver of the maiden and say (as follows) on behalf of the great-grandson of Kesava Sarman of the Kasyapa gotra which is associated with the three Pravara Rishis known as Kasyapa, Avatsara and Nidhriva, to the grandson of Narayna Sarman of above Kasyapa gotra and to the son of Madhava Sarman of the above *gotra, i. e.,* to the bridegroom Srinivasa Sarman of the same Kasyapa *gotra,* we request for the purpose of getting lawful children, the maiden, *i.e.,* the bride, who is the great grand-daughter of Govinda Sarman of the Kaundinya *gotra* associated with the three *Pravara* Rishis Vasishta, Mitravaruna and Kaundinya, the grand-daughter of Vishnu Sarman of the above said gotra and daughter of Madhu Sudana Sarman of the said gotra, her who has the name of Lakshmi and is born in the Kaundinya gotra."

* * * * *

Q.—If you find that *Madhava,* (?) the commentator of Manu and the authors of the Mitakshara,, Parasara Madhaviya, Smrithi Chandrika, Viramitrodya, Vyavaharamayukha and the Dattakamimamsa give the Sloka 142 Ch. IX Manu with the word *Bhajet,* and the word *Haret* is to be found in the printed editions of Manu, which would you consider to be the correct reading.

A.—The authors mentioned in the question are all considered to be highly authoritative in expounding Smrithi law and Smrithi literature. But what authority really there is in support of the reading found in the current editions of Manu is almost impossible now to estimate. And since I see there is no difference in the sense between the form of the Sloka as quoted and as embodied in the current editions of Manu, I am compelled to take both of them to be equally correct till something more definite is known regarding the authority on which the reading in the current editions is based.

Q.—If there were any difference in meaning between the words *Haret* and *Bhajet* as used in that Sloka, which reading would you accept as correct ?

A.—I would then naturally rely on the quotation made by such a large number of authoritative writers, more than on the single printed recension.

Q.—If the word *Haret*, be translated into "shall carry," can the word be appropriately used to signify the carrying of what is one's own ?

A.—I have already said that to translate *Haret* as "shall carry" is wrong. If it, however, be hypothetically so interpreted the "carrying" referred to in the context cannot relate to what is one's own. The ordinary and natural meaning of *Haret* is not "shall re-obtain."

Q.—Would the translation of "*Haret*" into "re-obtain" be correct in the following case, on the supposition that gotra arises on birth?

When a father possessed of self-acquired property gives his son in adoption and the son at the time of adoption, has no right to the property.

A.—To translate "Haret" as "shall re-obtain" would be wrong in any case. And I need not say that it would be so in this case also.

Q.—With reference to your last answer, please explain your answer to Mr. Krishnaswamy Iyer's question "assuming that the Gothra............ as meaning *re-obtain*?"

A.—As I said above, I am positive about translating '*Haret*' as "shall obtain". "Obtaining" means what they call "*Prapti*" in Sanskrit, *i.e.*, coming into the possession of a thing of which you were not then in possession, irrespective of the reason why you were not then in possession thereof. If in any case it so happens that the thing into the possession of which you come and of which you were not in possession then is a thing of which you had been in possession before and the possession of which you had lost later on, in that case alone—does *obtain* come to mean "re-obtain" also; or, in other words, as it is sometimes expressed by Sanskrit Pandits "*Prapti*" includes both *Alabdha Labha and Nashta Labha,* which interpreted means that "obtaining" includes "the coming into possession of what you had not before" as well as "of what you had not lost." It

is in the case where "Prapti" means Nashta Labha that "obtain" has to be understood in the sense "re-obtain," though *Haret* is translated only as "shall obtain." The meaning of "re-obtaining," which is also "obtaining," has to be derived from the sense of the term *Haret* only in the case referred to above and necessarily so in such a case.

Q.—If the same verb governs two objects in a sentence, and if it is necessary having regard to the nature of one of the objects to give a secondary sense to the verb as applied to that object, do the rules of interpretation require that the verb should be understood in a secondary sense with reference to that object?

A.—The rules of interpretation embodied in the Purva Mimamsa relate to the interpretation of authoritative scriptures based on revelation directly or ultimately. The sentences of command found in the scripture so as to impose obligations and restraints and give also directions are all taken to be fully authoritative whatever be the nature of their verbal composition. This being so, the rule, according to which a verb of command has to be similarly related to all its objects, gives us what is absolutely the best method of interpretation in the case. But where by adopting this rule incongruities and irrationalities come unavoidably into existence we have another rule by following which we make the scriptual commands, rational and consistent. This is done by observing the rule which says that when the primary and natural significance of the verb of command is not without inconsistency applicable to either of the two objects related to that verb, then in relation to such an object the verb shall have a secondary significance. Thus if on a certain supposition the primary and natural significance of *Haret* cannot be quite exactly the same in relation to *gotra* as in relation to *Riktha*, then since the command given by Manu is taken to be authoritative as commands found in the Vedas, we are bound in accordance with the rules of Purva Mimamsa to interpret *Haret* in its relation to *gotra* in whatever secondary sense would make that command consistent and rational. This rule to which I have referred in no way compels us to give up the primary and natural significance of *Haret* in relation to *Riktha* which is its other object.

Q.—Having regard to the intangible character of *gotra* and the tangible character of *riktha* would *gotra* and *riktha* be capable

of being the objects of taking, carrying, obtaining or re-obtaining in the same way and sense?

A.—I understand this question to be based upon what may be considered to be a very possible misunderstanding of the Mimamsa rule of interpretation put to me in cross-examination. What that rule really requires is that both *gotra* and *riktha* should possess what in Sanskrit would be called *Haranarhatwa* or "obtainability" as it may be translated into English. And in reference to the meaning of "obtaining" I have already given, it is easy to see that there is such an "obtainability" in relation to both of them. The tangibility of the one object and the intangibility of the other do not in any way contradict their common obtainability.

Q.—Assuming that in Manu's time and according to Manu a son had no interest in the property of the natural father during the life-time of his parents, how would you construe the word *Haret* in relation to the word *riktha* in Sloka 142, Ch. IX, Manu?

A.—Manu does not contemplate, because of the assumption made above and found in Manu, the adoption of a person who may be characterised as *Hritariktha* *i.e.*, he who has already come into possession of what he has to inherit. Therefore also it is that I have been so emphatic in regard to my translation that *Haret* can mean nothing other than "shall obtain."

Q.—With reference to the rule that stress is not to be laid upon the gender of the *Uddesya* in a rule, do you say that the word *Janayithu* is part of the *Uddesya* or *Vidheya*.

A.—I am glad that this question gives me an opportunity to correct an oversight which I committed in course of the trying cross-examination to which I was subjected. *Janayithu* qualifies and so defines the *Riktha*. Therefore it is not directly related to the *Uddesya* not to say that it is not itself the *Uddesya*. Nevertheless I feel that I may not be altogether wrong in having said that here also the *linga* or gender of the term *Janayithuh* is perhaps *Avivakshita*. The term *Janayithu*, however understood is here a part of the *Vidheya*.

Q.—Assuming that under the law the adopted son is not entitled to the property of *not only* his natural father but also the other members of his natural family, such as grandfather and

uncle, and that such a rule were based upon the text of Manu, sloka 142 Ch. IX, would it be based upon the construction of the word *Janayithu* itself or would it be an inference from the sloka ?

A.—I believe I have made myself clear upon this point already by saying that *Janayitru* can be made to mean anything more or other than the natural father only by implication and inference.

Q.—Mr. Krishna Kamala Bhattachari says that, according to the rules of Panini *Paitrika* means "*descended or come from the father,*" Do you agree with him ?

A.—The formation of this word distinctly shows that *Paitrika* is whatever is derived or descended from "*Pitru.*"

SUMMARY OF ENGLISH CASES.

Attorney General *v.* Great Northern Railway: (1916) 2 A. C. 356.

Highway—Bridge over highway—Increase of traffic—Standard of maintenance—Railway clauses Consolidation Act, 1845 S. 46.

Where a Railway line had to cross a highway and the private Act of Parliament authorised it by S. 46 to be done by building maintaining and repairing a bridge by which the highway was carried over the Railway and since the opening of the Railway, the traffic on the high way had considerably increased and it was found that the bridge could not stand the weight of heavy motor traffic, the question arose whether the liability of the Railway Company was to maintain the strength of the bridge as at the date of the construction of the Railway or to alter it to suit the exigencies of traffic.

Held, under such circumstances, the duty of the Railway Company as regards the maintenance and strength of the bridge was to be found in the Act and if the Act makes provision for the same, the general principle that "where persons acting under statutory authority for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is *prima facie* imposed on them to construct such works as may be necessary to restore to the public, the use of the

highway so interrupted and that the obligation so imposed is of a continuing nature involving not only the construction of such works but also their maintenance" has no application.

All the noble Lords excepting Viscount Haldane agreed on the construction of the Act, that the liability of the Railway Company was only to maintain the bridge as at the date of its construction.

Viscount Haldane held that the Act did not touch the present question and that the general rule mentioned above applied.

Boord and Son (Incorporated) *v.* **Bagots, Hutten and Company Limited**: (1916) 2 A. C. 382.

Trade mark—Registration—Similarity of device—Cat mark for gin—Trade marks Act 1905 Ss. 11, 19, 40.

The applicant prayed for registration of a trade mark for gin consisting of a pictorial label resembling a puss in bottle. The opponent had used a mark with a cat on and had a large sale in the United Kingdom and the East. There was no resemblance between the applicant's device and that of the opponent. The opponent objected that though there was no similarity between the two devices, his gin commanded a large sale in the East under the name of Cat Brand and as such the applicant's device should not be registered. In the absence of an intention to deceive on the part of the applicant and in the absence of any resemblance between the two devices, their Lordships held that there was no objection to the registration of the applicant's device and that the possibility of confusion arising from the insufficient description of the opponent's mark by ignorant people in foreign markets was not a ground for refusing registration.

In re **Garnham, Tylor** *v.* **Baker**: (1916) 2 Ch. 413.

Rule against Perpetuities—Gift offending against—Gift to bachelor for life with remainder to any wife he may marry with remainder to his children—Validity.

Under a gift to a bachelor for life with remainder to any wife he may marry with remainder to his children the class of children is ascertained upon the death of the first tenant for life,

although the enjoyment may be postponed during a life tenancy of a person who may have been unborn at the date of the gift. Such a gift therefore does not offend against the rule against perpetuities.

In re **Musgrave, Machell v. Parry**: (1916) 2 Ch. 417.

Payment under mistake of law—Recovery of amount so paid when allowed—Administration of estate of deceased person—Over payment by Trustee to cestuique trust under honest mistake—Court's power to adjust rights between trustee and cestuique trust.

The doctrine that a man cannot recover money which he has paid under a mistake of law has been very substantially limited in recent times and the mere fact that a mistake is an honest mistake of law, as long as it is not a mistake of public law, which every one is bound to know, has not prevented the courts from giving relief to one party as against the other doing justice between the parties.

When administering an estate of a deceased person the court will, in cases where trustees have under an honest and so to speak permissible mistake of construction or of fact overpaid one beneficiary, adjust the rights between the cestuique trust and the trustee in order that the latter may so far as possible be recouped the money which he has in advisedly paid.

In re **Yenidje Tobacco Company, Ltd.**: (1916) 2 Ch. 426 C.A.

Dissolution—Ordinary Partnership—Partnership in the guise of a Private Company—Dissolution—Grounds—Deadlock due to quarrels between partners if a good ground.

Where there are only two persons interested in a Company, where there are no shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the Company ought to be wound up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other.

In the case of an ordinary partnership between two people having equal shares the fact that a complete deadlock has arisen

owing to the disputes between the partners is a good ground for dissolution. It is also a good ground for dissolution of what may fairly be called a partnership in the guise of a private Company.

Rex v. Banks: (1916) 2 K. B. 621.

Duty of Prosecuting Counsel.

Prosecuting Counsel ought not to press for a conviction. They should "regard themselves" rather "as ministers of justice" assisting in its administration than as advocates.

St. Enoch Shipping Company Ltd. v. Phosphate Mining Co.: (1916) 2 K. B. 624.

Pro rata Freight—Claim to—Maintainability—Conditions—Quantum Meruit—Recovery on a, when allowed.

To justify a claim for *pro rata* freight, there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with. The consignee must accept the goods in such a way as to imply that he and the shipowner agree that the goods have been carried far enough and that the shorter transit shall be substituted for that named in the original contract.

To recover on a quantum meruit it is necessary to show a contract. When the amount to be paid is left in doubt it is measured by the merits of the services rendered; but there must be services expressly or impliedly asked for and to be paid for or agreed to be rendered and paid for. If a contract once made becomes impossible of performance, then in the absence of some new agreement the parties remain in the circumstances in which they find themselves. There is no new obligation upon one party to pay money to the other unless there is some contract to that effect.

Cone v. Employees' Liability Assurance Corporation, Ltd.: (1916) 2 K. B. 629.

Insurance Policies—Maxim "Causa proxima non remota spectatur"—Applicability—Use of words "directly or indirectly"—Effect.

To all policies of insurance the maxim "causa proxima non remota spectatur" is to be applied if possible. For that reason, when there are words which at first sight go a little further they are still construed in accordance with that universal maxim. Where the words used in a Life Insurance Policy were caused directly or indirectly by war held that the applicability of the maxim was excluded by those words and that a more remote link in the chain of causation was contemplated than the proximate and immediate cause.

Rex v. Baskerville: (1916) 2 K. B. 658.

Accomplice—Evidence of—Corroboration—Necessity—Nature required—Practice.

There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and in the discretion of the judge to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation the absence of such a warning by the Judge has been held to be a ground for quashing the conviction.

Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

The Ningchow: (1916) P. 221.

Pledge of goods—Contract of—Incidents—Right of pledgee to sell on default in payment—Pledgor's right to redeem—Contract for sale by pledgee after notice to pledgor—Effect.

A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession to sell on default in payment

and after notice to the pledgor, although the pledgor may redeem at any moment up to sale *i.e.*, at any moment up to the time of the exercise by the pledgee of his power of sale by entering into a valid contract of sale. Thereafter the pledgor's right to redeem is lost and he ceases to be owner of the goods.

JOTTINGS AND CUTTINGS.

Miscellany.—Not a few things of special interest to lawyers some more surprising than interesting are to be found in Treitschke's 'Politics,' a translation of which has recently been published, with an Introduction by Mr. Balfour. Here, for instance, is one of the surprising things: 'England is continually proclaiming martial law. No year passes without the Riot Act being read in some part of the United Kingdom.' That is certainly a pretty starting statement even from a German professor with a reputation for accurate observation. It is equalled only by this statement: 'In England a civil suit is so expensive that it is only within reach of the rich; the small tenant cannot bring an action against his landlord because its costs are prohibitive.' Litigation is certainly too costly in this country, but happily, it is not quite so bad as that. Treitschke has, however, something favourable to say of our judicial system. 'Trial by jury,' he says, 'has had a magnificent development in England, where it is closely bound up with popular ideals and regarded as a pillar of English freedom. Two circumstances have powerfully contributed to this result. Firstly, the unique social and economic position of the judges......Secondly, English judges are obliged to observe a reticence which is well suited to enhance the dignity of the Bench.' Treitschke approves, too, 'the stern English rule of unanimity.' He regards it, 'together with the powerful influence exercised on lay opinion by a highly esteemed body of Judges,' as 'the chief cause of the historic respect paid to the jury system in England.' To this rule of unanimity, he says, 'Englishmen have clung with a tenacity that does them honour.'

Treitschke, though a profound admirer of most things German, has a word of censure for the German Press. 'In our own country,' he writes, 'the so-called "revolver Press" has wrought untold mischief. If a crime is attributed to any individual a newspaper article is hurriedly composed and a proof sent

to the incriminated person, who is then compelled to purchase its suppression.' There have been journals in Vienna which subsisted on this traffic only.' This is written in support of his contention that the right of public accusation should not be left in the hands of private individuals, but that the right of indictment should belong only to a public prosecutor. That is certainly an arguable matter. What would appear to be beyond all dispute is the corruption of the German Press.—*The Law Journal, October 7*, 1916.

CONTEMPORARY LEGAL LITERATURE.

The *American Law Review* for September-October contains an interesting article from Mr. James Byrne as to *the probable changes in the laws of war* as a result of the experience learned in the present world war. He thinks that it is probable that after this war, nations agree that all private property on sea should be immune from capture, in other words agree to adopt the doctrine of *free sea* but at the same time he thinks, England cannot agree to it unless the other nations agree to the maintenance of the present relative naval preponderance of England. At the first Hague Conference, (1899) England was prepared to abandon the principle of contrabrand in case of war between nations which sign a convention to that effect but the other great powers were against it, including the United States of America. It is somewhat curious that it was so; for some fifty years previously a Secretary of state of the United States of America had himself made a similar proposal.

At the first Hague Conference, a Russian delegate proposed to prohibit the use of projectiles charged with explosives which diffused asphyxiating or deleterious gases. Denmark, Austria Hungary, France, and Great Britain supported it. Ultimately, however, England and the United States voted against the prohibition, the other states supporting. The experience of this war is not such as to induce the powers to contend for sanction to its use. Nor is civilised opinion equally with expediency likely to pronounce in favour of the hurling of bombs from the air. They only shock the world without any compensating military advantage.

Another paper in the same journal deals with the position of the *Governor* under the American constitution. In the Governor is

vested the supreme executive power in every State. As a result of this power, there is usually charged to him the duty to see that the laws are faithfully executed. He is usually elected on the November election day although in some places the dates vary. The Election is a direct Election and the electors are the qualified electors of the State typically described in Massachussets as "every male citizen of 21 years of age and upwards except paupers and persons under guardianship." The constitutional qualifications of the Governor are not severe in any State and in some they are absolutely negligible. A rather unusual qualification is the religious one required in S. Carolina that the Governor must not deny the existence of a Supreme Being. In most States, he must have attained the age of 30, though in some he is eligible at 25, in one alone, 35 being the required age. In only 3 constitutions the candidate is expressly declared disqualified by conviction for a crime. Only 3 constitutions declare that the candidate must be a male. By far the most important disqualification is the prohibition against dual office holding. The first duty of the Governor is to take the oath of office. Some States prohibit re-election, others re-election for more than specified terms, while yet some others prohibit re-election for a certain time. The salary of the Governor ranges from 1,500 dollars in Oregan to 10,000 dollars in California and New York, possible of increase but not of decrease during the term of Office. In some of the States the Governor has an advisory body of councillors. As the chief executive officer, he must transact all necessary business with the Officers of Government, Civil and Military. He is also the official representative of the State and conducts in person all intercourse with the other States and the United States. He has large powers of appointment though these have specially to be conferred and do not inhere in his Office. He has also the power of making *adinterim* appointments and where authorised, the power to remove Officers; bills are to be presented to him for approval. If he approves them, they become law; if he does not, he has to send it back with his objections. The veto can however be overridden by the legislature. In most States, in addition to the power to veto bills, he has power to veto items in appropriation bills. He has the power to pardon for all offences except treason and impeachable offences. Another important power is that over the militia as Commander-in-Chief. He may call out the militia

to execute laws, suppress irsurrection, repel invasion and preserve the public peace. One of the duties placed upon the State executive is to deliver up any person charged in any other State with treason, felony or other crime " who shall flee from justice to be found in his State." The Governor has no general authority to contract in the name of the State. He is liable to impreachment for high crimes, miscemeanours and malfeasance in office ; six States have specifically branded drunkenness as a ground for impeachment.

In another part of the same journal, an attempt is made to expose the hollowness of the German defence for putting to death Captain Fryatt. The German defence is that the rules as to cruisers cannot apply to submarines which are a new weapon of destruction, that the right rule to apply to them is that applicable to land warfare namely that the civilians have no right to defend themselves against regular military forces and if any merchantman chose to defend itself, the crew may be dealt with as franctireurs &c. But in urging the defence, it is overlooked that the same line of argument if pursued should protect enemy, *a fortiori* neutral merchantmen unless they carry contrabrand or break through the blockade.

BOOK REVIEWS.

THE INDIAN DECISIONS. (*New Series*) *High Court Reports Madras, Vol. II. Law Printing House, Madras.*

We have drawn attention to the excellence of this publication in reviewing the first Volume. The volume under review completes the Madras High Court Reports and comprises Volumes 5 to 8. The profession has to thank the Law Printing House for securing them a complete set of the Madras High Court Reports in such attractive form and for a comparatively low price.

THE LAW OF IMPARTIBLE PROPERTY IN INDIA *by J. C. Ghose. Second Edition, 1916. R. Cambray & Co. Calcutta.*

This Volume appeared in 1906 and formed a portion of the Tagore Law Lectures for 1904 which included also the subject of endowments. Since then the subject has so much developed and has necessitated a separate volume for the law of impartible

property only. The author has in this Edition rewritten many portions of the work and the Case law has been brought down to Septembr 1916. There is an appendix to the Volume giving the important enactments of each Province on the subject of impartible property. We should however wish that the Madras Impartible Estates Act of 1904 which prohibits alienations of the Chief Impartible Estates in this Presidency except under certain conditions should have been given among the Madras enactments and its effect on the settled law as to alienations of impartible estates considered.

THE TAMIL LAW JOURNAL (*Vyavahara Chintamani*) is the first thing of its kind in this part of the country and we are glad to find that it has already obtained a substantial amount of support and appreciation. So far as we have been able to see the selection of cases seems to be done with much care and the statement of the facts and the decision in each case is accurate. We are however not without doubts whether the ordinary layman can profit much by the study of this kind of literature which in spite of the legal theory of every man's knowledge of the law is becoming more and more specialised day by day. And while not unmindful of the merits of the Journal as a literary language we hope we may be pardoned for venturing to doubt its efficiency as a medium for the expression of complicated legal ideas. The experiment however must be made one day or another, if legal literature is ever to be made familiar in at least some degree to the ordinary citizen, in his own mother tongue. A half knowledge is a dangerous thing and a smattering of case law derived by busybodies from this kind of publication may be productive of more harm than good; but we hope that a wider diffusion of this kind of knowledge amongst the litigant public will in the long run make the publication a really useful one. The subscription is so fixed as to place the Journal within the easy reach of all.

[*End of Vol. XXXI.*]

The Madras Law Journal.

PART II.] JULY, 1916. [VOL. XXXI.

NOTES OF INDIAN CASES.

Venkatanarayana Pillai *v.* **Subbammal**, I. L. R. 39 M. 107. (P.C.)

In this case we have an exposition from Lord Wrenbury of the doctrine of dependent relative revocation. It is really, says his Lordship, a question of intention. If by his will a testator gives property to A and by a codicil gives the same property to B and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be displaced only in favour of B and (if B cannot lake) the gift to A should remain. If the testator's language is that he revokes the gift to A and in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. In this case it was not a valid disposition of the property by a previous will that was sought to be displaced by the later invalid disposition but an earlier authority to adopt by a later invalid disposition of property in favour of daughter's children who could not take if there was to be an adopted child. Their Lordships held the authority to adopt conferred by the previous will was not taken away by the subsequent will.

Subrahmanian Chettiar *v.* **Raja Rajesvara Dorai**, 39 M. 115. (P. C.)

In this case, their Lordships reaffirm the proposition that they laid down in *Ganesha Rao* v. *Tulajaram Rao,* [1] *viz.*, however supportable a compromise might be on other grounds it is invalid

1. (1913) I. L. R. 36 M. 295.

if it does not comply with the condition imposed by S. 462 of the Code of Civil Procedure, Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of minors. " It is not sufficient" say their Lordships quoting from *Manoher Lal* v. *Jadunath Singh* [1] " that the terms of the compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on the petition or in some way not open to doubt that the leave of the Court was obtained. "

The case is interesting also for the light it throws on the proper attitude to be adopted by Courts towards dealings with the trust estate by trustees. The trustees in the case had agreed to give a charge to the settlor and the charge had been utilised to give the creditor of the settlor in his turn a charge on the estate and the question was whether the charge was validly given. It was held by the High Court that the trustee had not acted in the matter in a reasonable way and therefore the charge was bad. It was contended that the giving of the charge was necessary to secure the consent of the settlor to the postponement of the charge in respect of his allowance which the proposed mortgagees insisted upon. Their Lordships repelled the argument by pointing out that there was no evidence on the one hand that the settlor would not have consented to the postponement without such promise, on the other that the mortgagees would have insisted upon such consent if the true legal position were explained to them. It was then argued that apart from the question whether the promise had proper consideration the charge in favour of the creditor could be supported as it was a proper thing to do in the circumstances the creditor having sued. This argument also their Lordships declined to accept on the ground that there was no evidence of any intention to create a charge apart from the agreement with the settlor.

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1. (1906) I. L. R. 28 All. 585.

NOTES OF INDIAN CASES.

Budhu Singh *v.* Laltu Singh : I. L. R. 37 A. 604 (P. C.).

Between the brother's grandson and the uncle, who has the preferential title to succeed? This was the question involved in the case and opinion was sharply divided in India between the one view and the other. Logic and literal construction may be said respectively to characterise the attitude of the two schools. The Privy Council has pronounced in favour of the logical view and it seems to be idle to examine the position. The only thing that remains is to see to what extent the latest opinion of their Lordships will necessitate a re-consideration of views on kindred questions expressed in this Presidency on the basis of literal construction. But with all the deference that is due to that august tribunal, we are bound to say that we fail to perceive any conflict between *Parasara Bhattar* v. *Rangaraja Bhattar* [1] and *Surayya Buktha* v. *Lakshmi Narasamma* [2] though we welcome the decided expression of their Lordships' view that when there is a difference of opinion Judges ought to refer the question to a Full Bench. The view that the uncle comes before the brother's grand-son does not necessitate the conclusion that the brother's grand-son does not come in at all as heir. He comes in as a Sapinda after all the specified Sapindas are exhausted. On the question as to whether all persons within the limits of Sapinda relationship are entitled to come in, there does not seem to be any difference of opinion between the Calcutta High Court and the Madras High Court. Their Lordships' judgment on the other hand raises a doubt as to whether descendants beyond three degrees are entitled to come in at all and if they do, where they come in. There is no convincing explanation for the term "brother's son" not including brother's great-grand-son or is it that brother's great-grand-son also is according to their Lordships entitled to come in before the uncle? Then again, it is not quite clear whether their Lordships have over-ruled the Madras decision because that decision is partly based on the view of Devananda Bhatta who is a great South Indian authority but is not considered as such in Benares, though

1. (1880) I. L. R. 2 M. 202. 2. (1882) I. L. R. 5 M. 291.

the remarks of their Lordships as to the value of the enunciation in the Smriti Chandrika seem to be of general application. We are not also certain that the Privy Council intend that the spiritual efficacy theory is to be introduced in places where the Viramitrodaya is not an authority. To say that under the Mitakshara generally, capacity to offer funeral oblations is the test to be applied in discovering the preferential heir when Vijnaneswara never for once refers to that test but distinctly states that propinquity is the test, would be a curious perversion of things.

Madar Saheb *v.* **Kader Moideen :** I. L. R. 39 M. 54.

Holding a tenant-in-common in occupation of a house liable for the rent of the house, in the absence of exclusion can be justified only by an extension of the principle of *Watson & Co.* v. *Ramchand Dutt* [1], to all cases of occupation by a tenant-in-common, whether for making profit or for mere occupation purposes and whether it involves an exclusion or not. The case in *Watson & Co.* v. *Ramchand Dutt* [1], which came up for decision again on the question of limitation in (*Robert Watson & Co.* v. *Ramchand Dutt* [2]) was a case of profitable use of land by one co-owner in exclusive but lawful occupation. Anyhow that does not seem to be the English law. *Teasdale* v. *Sanderson*, [3] *Wheeler* v. *Horne*, [4] *M'Mâhon* v. *Burchell* [5]. Lindley on Partnership, p. 47. If however the extension is permissible, then, apart from any difference that the circumstance that there was a previous lease should make, Art. 120 would seem to be the appropriate article of limitation applicable to the case, for Art. 62, the only alternative article that can be thought of is applicable only to cases of receipt of money. But in this case, we should think that the circumstance that there was the previous lease must make a difference. In the absence of any evidence to show that the defendant had performed his duty under the lease to deliver possession, his possession should have been regarded as wrongful and either Art. 36 or 39 ought to

1. (1890) I. L. R. 18 C. 10 (P. C.) 2. (1896) I. L. R. 23 C. 799.
3. (1864) 33 Beav. 534 : 55 E. R. 476. 4. Willes. 208.
5. (1846) 2 Phillips. 127 : 41 E. R. 889.

have been applied. It was equally open to the plaintiff to rely upon Art. 115 and claim damages for non-delivery. The applications of any of these articles would exclude Art. 120.

Baiznath Lala *v.* **Ramadoss** : I. L. R. 39 M. 62.

We think that the application of Art. 62 in this case is justified though it does not follow that cases like *Ramasami Chetty* v. *Harikrishna Chetty* [1] are wrongly decided. Art. 62 is obviously not intended to apply to all actions coming within the category of actions for money received to the use of the plaintiff. A suit for an existing consideration which has failed would, for instance be action of that kind under the English law (See *Mahomed Wahib* v. *MahomedAmeer* [2])but is provided for in a separate article here. That article can appropriately be applied only to cases where an action could be maintained at the date of the receipt of the money. See *Ramasami* v. *Anda Pillai* [3]. Restriction of the class of suits coming within an article by reference to the third column is supported by high judicial authority. See *Rangiah Goundan* v. *Nanjappa Rao* [4]. It may also be doubted if actions in the nature of actions for restitution can properly be held to be within the category of actions for money had to the use of the plaintiff.

Annamalai Chetti *v.* **Velayudha Nadar,** I. L. R. 39 M. 120. (F. B.)

This case overrules the decision in 29 M. 212. Under the ruling of the Full Bench, a contemporaneous agreement to give time is pleadable in bar of an action on a promissory note payable on demand and time begins to run under article 80 only after the expiry of the period. The wording of article 73 would seem to support the conclusion on the question of limitation and the analogy of Ss. 62 and 63 of the Contract Act (because those sections directly apply only to subsequent agreements) and the wording of S. 32 of the Negotiable Instruments Act would seem

1. (1911) 21 M. L. J. 705.
2. (1905) I. L. R. 32 C. 527 at 533.
3. (1896) I. L. R. 18 M. 347.
4. (1903) I. L. R. 26 M. 780.

to support the conclusion on the other question. An agreement not in writing would not be provable in view of S. 92 of the Evidence Act. A question might arise whether limitation for the action by a *bona fide* holder in due course without notice who would not be bound by the agreement would also commence at the same time. We fancy not, because though article 73 might not be applicable to the case, as he could sue even within the period fixed in the agreement, under Art. 80 so far as he is concerned time should run from the date of the note. As no man would take a note which upon its face is barred, such a conclusion would not lead to any hardship in practice. Another point which though it has not been considered in the case (the note having been admitted in evidence by the Lower Court) may have a material bearing upon the question is as to the stamp duty. Are not the two documents to be read together and stamped as a promissory note payable after the time fixed? The case in 19 M. 368, discusses that aspect of the case and the question before the Full Bench can hardly be said to be finally decided till that question also is answered.

NOTES OF INDIAN CASES.

Venkatasubba Rao *v.* The Asiatic Steam Navigation Company: I. L. R. 39 M. 1. (F. B.)

The conclusion arrived at in this case seems to be right though it is difficult to agree with some of the reasoning on which it is based. A suit for possession could not, in the nature of things, lie against a person not in possession, and in this case, the Railway Company not being in possession of the goods sued for, and in the absence of any case of conversion against them, the only relief that could be claimed against them, was damages for loss or non-delivery and both these cases being provided for in special articles of limitation, it was hopeless to contend that any other article relating to tort could apply to such a case. It was a different question, however, whether Art. 115 should not apply. The language of Art. 31 being wide enough to cover cases of action framed *in contract*, we do not think it was permissible to go behind the plain words of the article on a presumption against unscientific tinkering with the scheme of the Act by the Legislature, a presumption which in the case of no legislature, at all events with the Indian legislature, can be particularly strong. One of the reasons given for excluding Art. 49 is that suits for specific movable property will not lie except in the circumstances enumerated in S. 11 of the Specific Relief Act. We are afraid that their Lordships are here confusing suits for "specific movable," with suits for "specific delivery of movables." While S. 10 of the Specific Relief Act says that a person entitled to specific movable property may recover the same, S. 11 enumerates the cases in which specific delivery of particular articles of movable property may be directed. Though the Court cannot make an order for specific delivery, the suit is none the less a suit for specific movable property and the defendant shall have complied with the claim by an offer to deliver the specific article.

Vijayabhushanammal *v.* **Evalappa Mudaliar**: I. L. R. 39 M. 17.

We think their Lordships rightly held in this case that there was a splitting up of the mortgage and the plaintiff was entitled to recover only his moiety of the amount. It has been held for instance, that when a suit for redemption by one member of the family has been dismissed, the other members can recover only their shares. *Sundar Lal* v. *Chitammal* [1]. If in a suit between two mortgagees the priority is determined in one way and in a subsequent suit by another mortgagee, the priorities are determined to lie in a different way, the conflicting decisions are reconciled by utilising the priority declared by the later decision as between the parties to the prior suit in the manner declared therein. The same rule has been applied to solve difficult questions as to conflicting priorities raised by the Registration Acts in England—see Ghose on mortgages p. 429. Bar by limitation of the claim of one of the co-obligees has been held in some cases to effect a severance. See *Dcraisami* v. *Nandisami* [2]. We do not see why the same principle should not apply where by reason of a prior litigation the interest of one of the parties entitled has been judicially determined and given effect to. On the other point decided in the case, that is to say the method of appropriating the amount paid we take leave to doubt the correctness of their Lordships' decision. S. 76 cl. (*h*) of the Transfer of Property Act and O. 34 R. 13 distinctly point to the contrary and S. 60 of the Contract Act applies only to *distinct debts* and not to portions of the same debt though becoming payable at different times. See I. L. R. 28 A. 25. Any how, it cannot apply when the principal has become due or there is no separate covenant for the payment of interest at stated periods.

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1. (1906) I. L. R. 29 A. 215. 2. (1911) 21 M. L. J. 1041 at 1051.

NOTES OF INDIAN CASES.

Manilal Gangadas *v.* **Secretary of State for India**, I. L. R. 40 B. 166.

We are not sure if the learned judges have not placed too broad an interpretation on the word "misapplication" in S. 42 of the Bombay District Municipalities Act, when they hold that it will cover a case of embezzlement by Municipal servants. The corresponding provision in the Madras Act (S. 259) uses wider language by declaring the Councillors liable for 'the loss, waste, or misapplication' of Municipal Funds 'if such loss etc. is a direct consequence' of their neglect or misconduct.

On the question of limitation, it is not quite clear that the case cannot be brought under S. 10 of the Limitation Act. As laid down in *Parr* v. *The Attorney-General* [1], and *The Attorney-General v. Aspinall* [2], the Councillors may well be said to be trustees in whom Municipal funds are vested in trust for specific purposes. The provisions in the Indian Acts for the Government suing the Councillors would appear to be a substitute for (or perhaps a cumulative provision alongside of) the right of the Attorney-General (the Advocate-General in India) to sue on behalf of the public. If, however, some rule of limitation is to be applicable to the action, the case certainly does fall within the language of Article 149, for the article is not restricted to suits relating to property *belonging* to Government. In this view a somewhat peculiar position will arise under the Madras Act which gives the right of suit to the Municipal Council or the Secretary of State. So far as a suit by the Municipal Council is concerned, it will be governed by Article 36 of the Limitation Act, and it will be anomalous that a suit for the same purpose should be maintainable by the Secretary of State at any time within sixty years.

Wasappa *v.* **Secretary of State for India**, I. L.R. 40 B. 200.

The soundness of this decision does not appear to us beyond doubt. The principle of 12, Madras. 105, namely, that rights created by a statute should be enforced in the manner indicated by the statute, has, of course, no appplication to the case; but beyond referring to the decision in 9, Bombay. 131, the learned Judges give no reason for holding that orders under S. 523

1. (1842) 8 Cl. & F. 409, p. 413. 2. (1837) 2 My. and C., p. 613.

and 524, of the Criminal Procedure Code are always subject to the result of a Civil suit. It may be assumed that a person whose goods have been taken under S. 523 is not bound to make a claim under these sections; and where no claim is made, the declaration in S. 524 'that the property shall be at the disposal of the Government' may not affect his title to the property or his right to recover the same from the Government in the ordinary course. It may also be taken that a Magistrate is not *bound* to make an enquiry as to the *title* and any order that he may make without such enquiry will not prejudice the rights of the real owner. But if the owner does come in under the section and the Magistrate, after investigation, holds that his claim is not established, we are not quite sure if the matter can be re-agitated in a regular suit. Neither in the case in 9 B. 131 nor in the English cases therein referred to was the Civil Court called upon to reconsider a claim adjudicated on by the magistrate; and this apparently was the distinction that the learned Judges who decided *Secretary of State* v. *Vakhasangji* [1], had in mind, though they express it (somewhat unhappily) as a distinction between cases under S. 523 and those under S. 524. The express provision for an appeal against orders under S. 524 and the absence of any provision (as for instance in S. 522) reserving a right of suit are, at any rate, some indications that an adjudication under S. 524 is not merely summary or temporary. It is too much to assume as a matter of course that no authority but a Civil Court can ever adjudicate on rights to property and that a suit is the only way in which such questions can be tried and adjudicated; nor can it be said that the order under S. 523 and 524 is necessarily restricted to the question of possession as distinguished from title.

Janaki Nath *v.* Hore Prabhasini Dasee, I. L. R. 43 C. 178.

Two questions of practice dealt with in the case deserve to be noticed; and as to one of them, we are, with all respect, unable to agree with the learned judges. The simpler question—and one sufficiently clear as we should think—is as to the points open on an appeal or review, when the bench admitting the case admits it only on a certain point. As regards appeals, the statutory right extends to the whole case and though it is open to an admission bench to reject or admit the appeal, there is no power in it

1. (1894) I. L. R. 19 B. 668.

to circumscribe the scope of the appeal (See *Lukhi Narain* v. *Ramchandra* [1]. In cases of review, however, the matter lies almost entirely in the discretion of the Court ; and, though the Code does not expressly so provide, it would seem open to the Court to restrict the review to particular points : whether such restriction was intended or not is a matter to be decided with reference to the circumstances of each case.

The other question is as to the necessity for notice to the opposite party when an appellant seeks a review of a dismissal of his appeal under O. 41, R. 11. The learned judges say (and it was also so stated in the course of the argument in *Abdul Hakim Chowdhury* v. *Hem Chandras Dass* [2]) that it has not been the practice in the Calcutta High Court to issue notice in such cases. We are not aware of any such established practice in Madras and we do not know what the practice in such cases is in Bombay and Allahabad. But we venture to think that the express provision as to notice in O. XLVII, R. 4 applies as much to the case in question as to other cases. The decision in *Joy Kumar Dutt Jha* v. *Esharu Nand Dutt Jha* [3] proceeded on the footing that the order for admission was an *order on an application*, which by its very nature was an ex parte application ; but it is now settled that a dismissal under Order XLI, rule 11 is not a mere refusal to entertain an appeal but has the effect of substituting the decree of the Appellate Court in place of the decree appealed against (as for instance for purposes of affording a starting point for execution, for applications to the Appellate Court for amendment of the decree and so on). This means that the respondent is a party to the appellate decree and there is therefore not difficulty in understanding who the 'opposite party' in such a case is ; and the respondent is certainly interested in supporting the decree of dismissal. No doubt so far as the real question in the appeal is concerned, it would make no difference whether the respondent is heard in opposition to the review application or in the appeal itself. But the argument of the learned judges overlooks the fact that the respondent may successfully oppose the review as much on the ground of limitation or (in the case of a first appeal) on the ground of non-compliance with sub-clause (*b*) of Order XLVII, rule 4 (2).

1. (1911) 15 C. W. N. 921. 2. (1914) I. L. R. 42 C. 433.
3. (1872) 18 W. R. 475.

It is noteworthy that in Order IX, the Code provides for notice to defendant of an application for restoration after a dismissal under rule 8 but not after a dismissal under rules 2 and 3. But this can furnish no safe analogy, for while Order IX provides for different kinds of legal consequence in the two classes of dismissal, there is no such difference between a dismissal under order XLI, rule 11 and a dismissal after notice. It may also be pointed out that Rule 19 of Order XLI which provides for re-admission of an appeal dismissed for default makes no distinction between default before notice to the respondent (rule 11 (2)) and default after notice to the respondent (rule 17 (1)). Of course there is no express provision in either case requiring notice of the restoration application to be given to a respondent but we presume it will scarcely be suggested on that account that no notice is necessary even in the latter case.

Some light is thrown on the present questions by the provision in rule 7 (2) of Order XLVII, dealing with the restoration of a review petition dismissed for default. If in such a case notice of the restoration application is necessary—and sub-clause 3 expressly makes it necessary—it is difficult to follow the argument of 'needless harassment' of the respondent relied on by the learned judges. The Code allows the respondent an opportunity of objecting to the restoration of a review application whether or not notice of the review application had been issued to him; and after all such opposition must relate only to the grounds alleged for the restoration and not to the grounds for review—which will remain to be dealt with later, and later still, the case itself (if the review should be granted).

It is another question whether the grant of review without notice to the opposite party will make the order a nullity as held in *Abdul Hakim* v. *Hem Chandra* [1] or it may not be sufficient to allow the respondent when he appears on the review to take exception to the order granting the review. Even if the latter view should prevail, we are not aware of any principle or statutory provision which requires that the objection should be taken only before the Bench which granted the review. It may be a matter of convenience, and if so, that consideration will best served by directing the case to be reheard by the same Bench.

1. (1914) I. L. R. 42 C. 483.

NOTES OF INDIAN CASES.

Sukumari Ghose *v.* Gopi Mohan Goswami: I. L. R. 43. C. 190.

It is of course not for us to say anything as to the discretion of a judge in certifying under the last clause of S. 22 of the Presidency Small Cause Courts Act that a suit was one 'fit to be brought in the High Court.' But we are unable, to agree with the view of Imam, J. that the first clause of S. 22 was inapplicable to the case before him. In holding that the suit was not cognisable by the Small Cause Court, it is not quite clear whether the learned judge drew a distinction between a suit for account generally (without a claim for a specific sum as the result of the account) and one in which the plaintiff is able to appraise the value of his claim at the time of instituting the suit or, having regard to the very nature of a suit for account, he meant to lay down broadly that such a suit would not lie in the Small Cause Court. Unlike the Provincial Small Cause Courts Act, the Presidency Courts Act does not enact a general exclusion of all suits for account from the cognisance of the Court; and we are not aware of any legal provision warranting a distinction between cases in which a plaintiff is able to value his claim beforehand and cases in which he is not able to do so. Even when a suit for account is instituted in that Court on the plaintiff approximately valuing his claim at an amount below Rs. 2,000 it may nevertheless happen on the taking of accounts that a larger amount is found due and we do not see why on the principle of the decisions relating to the jurisdiction of ordinary Civil Courts in such cases (see *Arogya Udayan* v. *Appachi Rowthan* [1] and *Sudarshan Das Shastri* v. *Ram Parshad* [2]), the Presidency Small Cause Court should not pass a decree for the amount actually found due. The limitation in S. 18 is only with reference to the institutional value and not in respect of the amount for which a decree can be passed. Even if this view is incorrect *Golap Singh* v. *Indra Kumar Hajra* [3], the proper course in such a case may be for the Court to Act under S. 19-A; and there is nothing to justify the conclusion that a suit for account is not cognisable by the Small Cause Court. If the suit is one cognisable by that Court the punitive provision in S. 22 has

1. (1901) I. L. R. 25 M. 543. 2. (1910) I. L. R. 33 A. 97.
3. (1909) 9 C. L. J. 367.

to be applied with reference to the amount decreed and not with reference to the facility or otherwise of valuing the claim in the plaint and if a plaintiff chooses to go to the High Court direct, there is nothing unreasonable in requiring that he must take the risk of his claim turning out to be less than he imagines.

Eusuffzeman *v.* Sanchia Lal Nahata.—I. L. R. 43 C. 207.

There is no doubt, some little difficulty in reconciling the view taken in this case with the strict letter of O. 21, R. 2, of the Code; but in the absence of any time limit for the decree-holder certifying a part payment, there is nothing unreasonable in holding that a statement of the part payment in the execution application is sufficient compliance with the rule, and that no separate application for the purpose is necessary. The same view was taken by the Madras High Court in *Rajam Iyer* v. *Anantaratnam Iyer* [1] following *Lakhi Narayan* v. *Felamani Dasi* [2]. It must, however, be borne in mind that when a decree-holder is relying on an alleged part payment to escape the bar of limitation, the statement of payment is not really one against his interest and does not, as such, carry with it the probability of its being true. The principle on which a short period is fixed by Article 174 of the Limitation Act for an application by the judgment-debtor to record an alleged payment will, therefore, equally apply to such a case, but that is a matter for the legislature to provide for.

Sri Rajah Simhadri Raju *v.* Secretary of State, I. L. R. 39 M. 67.

The Irrigation Cess Act has given rise to considerable difference of judicial opinion though it must be admitted, opinion is gradually settling itself. Judges have differed as to the circumstances under which the Government is entitled to levy water-cess, for instance, whether it is only when works of irrigation have been constructed or even when such works are not constructed provided the other conditions are satisfied. (See Mr. Justice Sankaran Nair's judgment in *Secretary of State* v. *Janakiramayya* [3]). But on this question, it seems now to be fairly agreed that though the preamble seems to contemplate

1. (1915) 29 M. L. J. 669. 2. (1914) 20 C. L. J. 131.
3. (1914) I. L. R. 37 M. 322.

the application of the act only to cases of new constructions, the enacting part is wide enough to cover other cases as well and its operation cannot be legitimately cut down by reference to the preamble. See *The Secretary of State for India* v. *Janakiramayya* [1], *Secretary of State for India* v. *Maharajah of Bobbili* [2]. Again Judges have differed as to what is a Government stream or water. On the one side there is the extreme view taken in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [3] relying on the declaration in the Land Encroachment Act, that all streams are Government streams to whomsoever the bed and banks belong. This view too has not received much support. Benson and Sundara Aiyar, JJ. in *Venkataratnamma* v. *Secretary of State* [4], Sadasiva Aiyar and Bakewell, JJ. in *The Secretary of State for India* v. *Janakiramayya* [1], Chief Justice and Seshagiri Aiyar, JJ. in *Secretary of State for India* v. *Maharajah of Bobbili* [2], have taken a different view. As the Chief Justice states in the last mentioned case, opinion seems to be fairly agreed that where both the banks belong to the Crown, the water is Government water, and it is the reverse where both the banks belong to a private owner. (See *Kalianna Mudali* v. *Secretary of State for India* [5], the case of a stream in patta land where bed was not marked Poramboke). Where only one bank belongs to a private owner, the view of Bakewell, J. is that the water is nevertheless Government water while Sadasiva Aiyar, J. thinks that so far as water drawn off from that side is concerned, the water is not Government water. This question is practically the same as that involved in *Secretary of State for India* v. *Ambalavana Pandarasannadhi* [6], and *Secretary of State for India* v. *Swami Narathee Swarar* [7], unless the latter case is differentiated on the ground that no question of a stream was involved in it. The implication of that view is that if at any point above the bed of the stream belonged to the Crown, the water will get impressed with the character of Government water which it cannot lose. This view ignores the peculiar incidents of property in flowing water and seems to be inconsistent with the view taken by the Chief Justice in *Secretary of State for India* v. *Maharaja of Bobbili* [2]. The question whether the Government could tax when the water is taken in the

1. (1915) 29 M. L. J. 389.
2. (1915) 30 M. L. J. 163.
3. (1910) I. L. R. 34 M. 295.
4. (1914) I.L. R. 37 M. 369.
5. (1915) 31 I. C. 982.
6. (1910) I. L. R. 34 M. 366.
7. (1910) I. L. R. 34 M. 21.

exercise of natural or riparian right is an open question though the language of the Land Encroachment Act would seem however to point to the contrary. If the water is Government water only subject to natural rights it is hard to say that a person exercising that right is taking Government water. There was some doubt as to the point of time at which the engagements referred to in the Act should be sought for and the length to which the engagement can be assumed to extend in particular cases and the circumstances from which an engagement could be inferred. Though there was some, by no means decided, expression of opinion that the engagement should be one that existed at the time of the Act (*Secretary of State for India* v. *The Maharajah of Bobbili* [1]), it now seems to be fairly agreed that there is no restriction as to the time at which such engagements may be sought for. *Zemindar of Kapileswarapuram* v. *Secretary of State,* [2] *Kandalam Rajagopalacharyulu* v. *Secretary of State for India,* [3] *Sethumadhava Chariar* v. *Secretary of State for India* [4]. The permanent and the Inam settlements have been taken to imply an engagement to supply water free of charge to the area marked wet (*Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [5]). Mr. Justice Sankaran Nair was for holding that the engagement should extend to affording facilities for extension as well as improvement of cultivation (except when irrigation works constructed by the Government have improved the water sources), but this view has not generally commended itself. As a rider on the accepted rule, it has been also held that if with the accustomed flow extension or improvement of cultivation is possible such improvement or extension cannot be charged (*Secretary of State for India* v. *Maharaja of Bobbili* [1], *Secretary of State for India* v. *Ambalavana Pandarasannadhi* [6]). In the case under review an engagement for supplying free ⅓rd of the river water was found by reason of a previous adjudication between the party and the Government in favour of the right to that quantity of water without any qualification as to Government's right to levy water cess. Mr. Justice Sankaran Nair says that where a right to take water is proved, an engagement not to levy cess should be implied even though no express agreement to that effect is proved. As however there is no difficulty in conceiving of a right to take water subject to payment, (cf. *Kandukuri Mahalakshmamma* v.

1. (1915) 30 M. L. J. 163.
2. I.L.R. 37 M. 355, 359.
3. (1913) 14 M. L. T. 454.
4. (1914) 1 L. W. 941.
5. (1910) I. L. R. 34 M. 295.
6. (1910) I. L. R. 34 M. 366.

Secretary of State for India [1]) would it not have been better to base the exemption on the ground that *pro tanto* the water is not Government water, having regard specially to the way in which the Government right of property is defined in the Land Encroachment Act? But as pointed out by Mr. Justice Sankaran Nair, in *Secretary of State* v. *Janakiramayya* [2], the term engagement in the Act must have been very loosely used to cover cases of Zamindars and Inamdars. The engagement, in such cases, is in fact, not *to supply* water but only not to withhold water. According to Mr. Justice Bakewell, the engagement in the case of riparian estates might include the riparian and other natural rights.

In the case of Inam settlements, it has been held that notwithstanding the area mentioned as wet in the Inam title-deed is less, it may be shown that the area entitled to free cultivation is greater by reason of an earlier engagement, *Sethumadhavachariar* v. *Secretary of State* [3]. Though Courts have refused to infer an engagement from the mere fact that cess has not been levied for a long time they have done so when in addition to that fact there was also the circumstance that contributions were made for the irrigation works either in the shape of land or in money by the landholder or the independent water sources of the landholder were intercepted. *Zemindar of Kapileswarapuram* v. *Secretary of State* [4].

Trasi Deva Rao v. Parameshwaraiya : I. L. R. 39 M. 74.

The point in the case was whether S. 14 of the Limitation Act applies to the Provincial Insolvency Act. Their Lordships hold that it does not. A Full Bench of the Allahabad High Court has taken a different view, *Dropadi* v. *Hira Lal,* [5] but the view taken in this case is in accordance with the reasoning in *Abu Backer Sahib* v. *Secretary of State for India* [6]. The last case however is unsatisfactory in that it does not refer to the series of cases including a Privy Council case relating to other Acts which seem to restrict the application of S. 29 of the Limitation Act to *periods* prescribed. See *Srinivasa Aiyangar* v. *Secretary of State* [7].

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1. (1910) I. L. R. 34 M. 295.
2. (1914) I. L. R. 37 M. 322.
3. (1914) 1 L.W. 941.
4. I. L. R. 37 M. 359.
5. (1912) I. L. R. 34 A. 496.
6. (1909) I. L. R. 34 M. 505 (F. B.)
7. (1912) I. L. R. 38 M. 92 and 98.

Ramakrishna Pattar *v.* Narayana Pattar: I. L. R. 39 M. 80.

With all respect, we are afraid that their Lordships have put an unnecessarily narrow construction on S. 42 of the Specific Relief Act. We do not see why a right to a *contractual right* is not a right to property. The mere fact that the declaration asked for referred to the obligations on the discharge of which, certain pecuniary advantages would accrue to the plaintiff cannot make the question any the less concerning *a right to property.* We do not believe that a different idea is intended to be conveyed by the words "right to property" in S. 42 of the Specific Relief Act from that by "declarations of right" under Order 25 R. 5 of the Rules of the Supreme Court in England. Under the English law it has been held that the Court could declare whether parties to a mercantile contract are bound by it or not (*Societe Maritime* v. *Venus Steam Shipping Company*[1],) or, that a sub-agent who had stipulated for a secret commission would become indebted to the principals when or as he should receive any portion of such commission, *Powell and Thomas* v. *Easan Jones & Co.* [2]. It would be interesting to compare the expression "right to property" with the definition of actionable claim in S. 3 of the Transfer of Property Act. An actionable claim is therein defined as a claim to a debt.

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1. (1904) 9 Com. M. Cases 289. 2. (1905) 1 K. B. 11.

NOTES OF INDIAN CASES.

Kusodhaj Bhukta *v.* **Braja Mohan Bhukta,** I. L. R. 43 C. 217.

The decision in this case seems to us unexceptionable and it must be treated as substantially disapproving of the judgment in *Jogeswar Atha* v. *Ganga Bishnu Ghattack* [1], for the judgment in that case affords no basis for assuming that the view therein taken was intended to be restricted to decrees by consent. The learned Judges there take the broad ground that the provisions of the Civil Procedure Code as to review are only 'enabling' and that there is nothing in law to prevent a person from instituting a suit to rectify a mistake in a decree. The observations in *Chand-mea* v. *Srimati Asima Banu* [2] and *Bhandi Singh* v. *Dowlat Ray* [3] would seem to be directed to explain this decision on the ground that the decree there in question was one passed without jurisdiction, but, with due respect, we doubt if the distinction is well founded.

As to the power of the Court to relieve against mistake, the principles laid down in the *Huddersfield Banking Co.'s Case* [4] would equally hold good in India, but on the question of practice we venture to doubt if, under the Indian Procedure, a separate suit will lie to rectify a mistake in a decree, even in cases where that decree was passed by consent; and this is the point on which Mitra, J., based his judgment in *Jogeswar Atha's Case*. After the Judicature Act, the power of review or rehearing (by other than an Appellate Court) is much more limited in England than under the older Chancery practice and it was on that ground that Romer, J. in *Ainsworth* v. *Wilding* [5] referred the parties to a fresh action (see also the explanation in this case as to the circumstances under which the action was brought in the Huddersfield Banking Company's case). Under the former practice, the Master of the Rolls in *Davenport* v. *Stafford* [6], while affirming the power of the Court to relieve against mistake, observed "I doubt whether the form of proceeding in such cases is strictly settled or whether the same form is exclusively applicable to all cases * * * * * there may be differences in this respect between cases of fraud and

1. (1904) 8 C. W. N. 172.
2. (1906) 10 C. W. N, 1024.
3. (1912) 17 C. W. N. 82.
4. (1895) L. R. 2 Ch. 273.
5. (1896) I. L. R. 1 Ch. 673.
6. (1845) 8 Beav 503.

cases of mistake. In cases of fraud the party aggrieved may file an original bill for relief and it may well be thought that he ought always to do so." This view perhaps explains the assumption of the Indian Legislature (in Art. 95 of the Limitation Act) that a suit will lie to set aside a decree obtained by fraud while there is no such indication in respect of relief on the ground of mistake. It would appear that the power of the Court to rectify a decree on the ground of mistke rests on mere equitable grounds and not on any 'cause of action' or right of suit properly so called resting in the party. The processual system of India provides amply for relief being obtained in such cases by way of review—the terms of O. 47 R. 1 as to the grounds being very wide—and it may be a reasonable deduction therefrom that no separate jurisdiction for the purpose can be invoked. In cases of fraud however the conduct of the wrongdoer may be taken to give the party wronged an independent cause of action to found a suit upon. It must be admitted that the elaborate judgment of Mr. Justice *Mookerjee* in *Mussumat Gulab Koer* v. *Badshah Bahadur* [1] puts fraud and mistake on the same footing for the present purpose but the learned judge was then dealing with a case of fraud and the few scattered observations relating to cases of mistake are clearly obiter.

Lakhipriya Dasi *v.* Raikishori Dasi, (I. L. R. 43, C. p. 243).

On a question of practice like the one raised in the present case, uniformity of practice is perhaps even more important than the soundness of the particular view as a matter of law. We must, however, say that the argument in this case based on S. 117 of the New Code does not seem to be of much weight. That section merely enacts that the provisions of the Code shall apply to the High Courts, and it corresponds to S. 632 of the Code of 1882. The principle of the decision in 27 Madras 121 is that the scheme of the appeal chapter in the code is such that it cannot be made applicable to appeals from one Judge of the *same* court (though exercising a special jurisdiction) to other judges of the same court (see also the Judgment of Sadasiva Iyer and

1. (1909) 13 C. W. N. 1197.

Napier, JJ. in *Venugopala Mudaly* v. *Venkatasubba Mudaly* [1].) And it is only reasonable to hold that order 41 rule 10 cannot be taken out of its context and given a wider application. This view seems to have at one time obtained in Calcutta also (see *In re Ramsebak Misser* [2]) and we are not able to trace from the reports when and how a different practice came into vogue. If we remember right, the Madras High Court also has latterly departed from the principle underlying the decisions above referred to but that was in connection with appeals from the original side. So far as any inference can be drawn from the scheme of the Presidency Towns Insolvency Act, the provisions of part 6 and part 11 clearly seem to suggest that the Courts exercising jurisdiction under the Act are not *prima facie* governed by the Code of Civil Procedure.

Soundararajan *v.* **Arunachallam,** I. L. R. 39 M. 159. (F. B.)

There was no way of getting out of the Privy Council decision in *Suraj Narain* v. *Iqbal Narain* [3] and we think that the Full Bench did right in following it. More recently, in *Mussamat Girja* v. *Sadasiv Dhundiraj* [4] the Judicial Committee have, after a full consideration of the authorities, reaffirmed the view expressed n *Suraj Narain* v. *Iqbal Narain* [3]. This view though in conflict with that adopted for a long time in this Court and so far as one could judge, assumed in several Privy Council dicisions themselves (see for instance *Pirthi Pal* v. *Jowahir Singh* [5]) is, it must be admitted, more suited to the present requirements and will be received with general satisfaction. The Saraswati Vilasa and the Vyavahara Mayukha, it might be readily conceded, support the view taken by their Lordships. But the text of the Viramitrodaya relied upon seems by no means to be conclusive on the question, for it seems to us that that passage is equally consistent with the position that while partition cannot generally be had without the consent of all, it can be *enforced* at the instance of one. Devanda Bhatta, the great South Indian authority (who is not referred to) seems to be distinctly against it. In chapter VII.

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1. (1915) M. W. N. 211. 2. (1870) 5 B. L. R. 179.
3. (1916) 20 C.W.N. 1085. (P. C.)
4. (1913) I. L. R. 35 A. 80=L. R. 40 I. A. 40.
5. (1886) I. L. R. 14 C. 493.

S. 50, he says "the conclusion here is that no partition, sale or gift is to be made of hereditary immovable property except with the consent of coheirs." One possible explanation for the divergence between the Smriti Chandrika and the two later works is the failure of the former to recognise the distinction between *division in status* and *actual division* which seems to be clearly perceived only in the Saraswati Vilasa, the Vyavahara Mayukha and the Viramitrodaya.

Their Lordships' decision, however, can by no means be taken to have settled all the doubts and the difficulties on the subject. The extent of communication that is necessary to give effect to a declaration of intention, the persons to whom the declaration should be communicated and the effect of any defect in the communication must remain subjects for anxious judicial consideration to be finally settled only by the Privy Council.

In the view taken by their Lordships, it seems to be difficult to resist the conclusion that alienations of the shares of individual members in the entire property would equally operate to sever the status, provided due notice is given of the alienation to the other members. A transfer of the share in a portion only of the family property or of portions of family property without reference to the share of the vendor cannot of course have this effect. The first attempts the legally impossible while the second does not at all involve a determination to separate and even if such a determination can be spelt out of it, it must be a matter for consideration whether a transaction *prohibited* in law can effect a severance good in law.

NOTES OF INDIAN CASES.

Manjappa Rai *v.* **Marudevi:** I. L. R. 39 M. 12.

In this case their Lordships hold that under the Aliyasantana system of law the property of an individual member descends on his death not only to his nearest relations but to all the members of the nearest branch. In so laying down the law, their Lordships purport to follow the rule laid down in *Antamma* v. *Kaveri* [1], on an enquiry into the usage of the people concerned. With all deference we think that the precise question that arose for decision in this case did not arise in that case, the only question in that cose being as in the Full Bench case in *Krishnan Nair* v. *Damodaran Nair* [2] whether the Tarwad or the branch was preferentially entitled ; whether at all any distinction should be made as between the members of the branch was not considered. Though it is not impossible to conceive of a rule of succession providing for devolution to a group consisting of various grades of relations, giving preference to, it may even be, to members of that group undivided from the deceased (cf. the rule as to succession in the case of the self-acquired property of a Hindu) *Marudayi* v. *Doraisami Karambian* [3], *Fakirappa* v. *Yellappa* [4], *Nana Tawker* v. *Ramachandra Tawker* [5], the rule laid down, in so far as it recognises the right of representation in the case of collateral successions is in advance of anything found in the ordinary Hindu law which recognises such right of *representation* only in the case of *lineal male descendants.* We are afraid that the rule of succession to the nearest branch, far from being a rule of succession, is but a mitigated form of the old doctrine of lapse. The inapplicability of the rule to a status of division is as much an objection to the rule as stated in this case as to the doctrine of lapse to the Tarwad. The rule of Equity and good conscience, custom failing, would seem to be the rule of Hindu law,—to the nearest sapinda the property goes, *mutatis mutandis* on correct Aliyasantana analogies, substituting *nephews and nieces* for *sons.*

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1. (1884) I. L. R. 7 M. 575.
2. (1912) I. L. R. 38 M. 48.
3. (1907) I. L. R. 30 M. 348.
4. (1898) I. L. R. 22 B. 101.
5. (1908) I. L. R. 32 M. 377.

Chakkra Kannan *v.* **Kunhi Pokker**, I. L. R. 39 M. 317.

The decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], was based upon a rule of construction which had the approval of the Privy Council in *Mahmad Shumsool* v. *Shewakram* [2] and as pointed out in *Kalliani Amma* v. *Govinda Menon* [3], there was no legal difficulty in applying that rule to Malabar. The only legitimate way of putting an end to that rule is by declaring that modern practice does not justify the imputation of such an intention. This has been done, with what success it is yet to be seen, by Mr. Justice Seshagiri Aiyar in the analogous case of widows. The attempt made in *Kenath Puthen Veetil Tavazhi* v. *Narayanan* [4], and *Ummanga* v. *Appadorai Pattar* [5], to restrict the rule to cases where Tavazhis had become distinct tarwads is based upon the assumption that between the tarwad and the individual there is no intermediate group that can hold property. The Marumakkathayam rule that property of a woman descends to her Tavazhi and the corresponding Aliyasantana rule of the devolution of all individual property to the nearest branch is opposed to such an assumption. As well pointed out by Mr. Justice Srinivasa Aiyangar property gifted to wife and children is only a species of branch property. Other kinds of branch property are property inherited by the branch, property gifted to or purchased by the branch or if the analogies of Hindu Law should apply, joint acquisitions of the branch. The rule laid down in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], may be legitimately extended to cases where the grant is made by a person equally related to or owing a moral or natural obligation to provide for the branch or again if the Hindu law analogies should apply where the grant is to the heirs of the donor. The circumstances, under which the presumption is justified have already been the subject of conflicting decisions *Kuyyattil Kundan Kutty* v. *Vayalpath Parkum* [6]. It need hardly be stated that the rule in question is only a rule of construction and the presumption may always be rebutted. It has, for instance, been held that a grant to the wife alone when

1. (1892) I. L. R. 16 M. 201.
2. (1874) L. R. 2 I. A. 7.
3. (1911) I. L. R. 35 M. 648.
4. (1904) I. L. R. 28 M. 182.
5. (1908) I. L. R. 34 M. 887.
6. (1916) 32 I. C. 107.

there are the children alive is a circumstance which will rebut the presumption. *Narasamma Hegadithi* v. *Billa Hesu Pujari* [1], *Duja Bhandary* v. *Venku Bhandary* [2]. The correctness of this ruling, at any rate as applied to Aliyasantana people may be doubted as the mother would under that system be the Ejamanthi of the branch and may appropriately be presumed to represent the branch. (Cf. 22 Travancore Law Reports 293) *Kalliani Amma* v. *Govinda Menon* [3]. In *Naku Amma* v. *Raghava Menon* [4] the grant of property to a woman *simpliciter* by the husband is held to be a circumstance in support of the ordinary presumption. The junction of the mother and the eldest son is also suggested as a circumstance tending in the same direction. *Ummanga* v. *Appadorai Patter* [5]. But the point is hardly a settled one. *Paru Amma* v. *Itticherri Ammah* [6]. Though it is stated generally that such property is held with the incidents of Tarwad property, those incidents have not been set forth precisely or exhaustively in any case and it is doubtful if all the incidents of Malabar Tarwad would attach to such property. In the matter of management, it has been held in *Parvathi Katilamma* v. *Ramachandra Ejman* [7], that a branch manager unlike a Tarwad manager is liable to account for the income.

In *Naku Amma* v. *Raghava Menon* [4] Mr. Justice Abdur Rahim is of opinion that apart from any question of the sufficiency of Tarwad property, each member of the branch is entitled to an allowance out of the branch property. Whether residence at the Tavazhi house is a condition precedent to the grant of such an allowance and whether, in the absence of a Tavazhi house at least the other members would be entitled to such an allowance is not yet settled but having regard to the decision in *Marudevi's Case* [8] it does not seem to be difficult to guess the probable answer that will be given. On the interesting question raised in the case and answered by Mr. Justice Sadasiva Aiyar, viz whether the benefits of a grant to a woman and her children by the husband can be confined to the

1. (1913) 25 M, L. J. 637.
2. (1915) 31 I. C. 854.
3. (1911) I L. R. 35 M. 649.
4. (1912) I. L. R. 38 M. 79.
5. (1908) I. L. R. 34 M. 387.
6. (1916) 32 I. C. 459.
7. (1909) 7 M. L. T. 273.
8. (1911) I. L. R. 36 M. 203.

children of the donor or whether they extend to children born of subsequent marriage as well, if it is permissible to hold that two out of three members of a Hindu family can inherit property with the incidents of joint family property, (*Cf. Juggumpet Case* [1]) it is surely not an unwarranted exercise of *legal imagination* to conceive of a group consisting of the children of a woman by the donor holding property with the incidents of Tarwad property. A little deviation from the ordinary rut of legal ideas may be pronounced but is not necessarily rank heresy.

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1. (1902) I. L. R. 25 M. 678.

NOTES OF INDIAN CASES.

Ramchandra *v.* Shripatrao; I. L. R. 40 B. 248.

This case raises a point of some nicety. A Hindu father mortgages family property and sometime later brings a suit for redemption which on his death is allowed to abate. Years afterwards his son who was in existence at the date of the mortgage but who had not joined either in the mortgage or in the father's suit for redemption brings a suit of his own for redemption. The learned Judges hold that the abatement of the first suit is no bar to the second. Referring to the cases in *Gansavant Balsavant* v. *Narayan Dhond Savant* [1] and *Padmakar Vinayak Joshi* v. *Krishna Joshi* [2] they say that after the Procedure Code of 1877 no legal proceeding by the father alone short of actual redemption would deprive his co-parceners of their right to redeem. This view does not seem to us to be beyond doubt. The learned Judges lay stress on the fact that there was nothing to show that the father's suit was brought in a representative capacity and as a redemption suit it was defectively constituted in the absence of the son. With reference to the decision of the Privy Council in *Kishen Pershad* v. *Har Narain Singh* [3] they say that it cannot be regarded as an authority with regard to redemption suits.

As to the question of representative suit and defect of parties, it appears to us that the learned Judges have not attached sufficient importance to the fact that the first suit was brought by the mortgagor himself who was also the father. In the converse case of the suit having been brought for sale by the mortgagee, the properties could have been sold in default of redemption by the father and the sons would be bound thereby unless they could show that the debt was not one binding upon them. The effectiveness of the execution sale as against the other members of the family depends not upon the representative character of the suit but upon the power of the defendant to bind them by his dealings. There is nothing in the decisions of the Judicial Committee in *Daulat Ram* v. *Mehr Chand* [4], and *Sheo Shankar Ram* v. *Jadu Kunwar* [5], (which was a case of foreclosure) to indicate that the defendant must be described as being sued in a representative character. We can see no reason

1. (1883) I. L. R. 7 B. 467.
2. (1885) I. L. R. 10 B. 21.
3. (1911) I. L. R. 33 All. 272.
4. (1887) I. L. R. 15 C. 70.
5. (1914) I. L. R. 36 A. 383.

they while should be otherwise when the father sues as plaintiff. If for instance he is a mortgagee he can sue by himself to enforce the mortgage. (See *Adaikalam Chetty* v. *Subban Chetty* [1], *Madan Lal* v. *Kishen Singh* [2]. A case in which he is the mortgagor seems to us to be an *a fortiori* case. No doubt a suit for redemption by him involves the relieving of the family property from encumbrance; but it is primarily an attempt to pay off a debt contracted by himself. Why should the sons be impleaded therein? The Transfer of Property Act allows the mortgagor to bring a suit for redemption and Sec. 85 of the Transfer of Property Act cannot take away this right.

As to the question of the effect of the abatement, there can be little doubt that the son could, if he had so chosen, have continued the former redemption suit after the death of the father. It is not necessary for this purpose that the suit must purport to be a representative suit. It will of course be incorrect to say that in every case in which one person could continue a suit instituted by another he is bound to do so on pain of being debarred from enforcing his right by a separate action. The question will depend upon the identity or the separateness of the cause of action. The recent decision of the Privy Council in *Venkatnarayana Pillai* v. *Subbammal* [3], may give rise to some doubts and difficulties in applying this rule to reversioners. But in the case under notice it is not possible to see how the son could have a cause of action different from that of the father. He may have an independent right in the property but that it is not the cause of action for the redemption suit. The position may be otherwise when one member of a joint family seeks to redeem a mortgage made not by himself but by another, and there are other members still of the family who are not parties to the suit. In such a case it may be as the learned Judges observe that the defeat of one co-parcener in his suit for redemption will not bar the exercise of the right by the others.

Madhusudan Sen *v.* Rakhal Chandra Das Basak : (I. L. R. 42 C. 248).

The judgment in this case deals with a number of questions arising out of the relationship of principal and agent. As to the

1. (1914) 27 M. L. J. 621. 2. (1912) I. L. R. 34 A. 572.
3. (1915) I.L. R. 38 Mad. 406.

article of limitation applicable to a suit for account, the preponderance of authority is certainly in favour of the view that Article 89 is not excluded merely by the fact that there is an express agreement to account. A covenant implied by law and an express covenant to the same effect stand on the same footing, the case here being the converse of that in *Zemindar of Vizianagaram* v. *Suryanarayana* [1]. The effect of the existence of a security bond by the agent himself or by another person, on the question of limitation does not seem to us altogether beyond doubt. Such a bond may create a mortgage or charge within the meaning of the Transfer of Property Act; and *prima facie* Article 132 will apply to a suit to enforce it. The difficulty, however, arises from the fact that the mortgage or charge can be enforced only for such amount as the taking of accounts may show to be due. No doubt, even in cases of ordinary suits to recover a debt some accounts may have to be taken, but this is not what is meant by a suit for accounts in the well-known sense of that expression. The suit contemplated by Article 89 of the Limitation Act however is a suit for accounts in its technical sense and it may well be doubted whether the mere fact of the existence of a security will suffice to prolong the period during which the agent is liable to be called on to account. This is the basis of the decision in *Jogesh Chandra* alias *Dhalughose* v. *Bonode Lal Roy* [2]. It may well be said that the accounting is the essential preliminary (cf. *Shib Chandra Roy* v. *Chandra Narain Mookerjee* [3]) to the enforcement of the charge and if the right to demand the account is barred, the charge cannot avail. Some support to this kind of argument is afforded by cases like *Raja Rajeswara Dorai* v. *Arunachalam Chettiar* [4], holding that Article 144 will not apply even to suits for recovery of possession when other reliefs which are preliminary to the right to possession have become barred. The difficulty of the position will be emphasised when the security is given by a stranger. The decision in *Subramania Aiyar* v. *Gopala Aiyar* [5], cannot reasonably be pressed into service in such cases.

The decision in the case under notice is, no doubt, supported by that in *Hafezuddin Mandal* v. *Jadu Nath Saha* [6], but in that case also the applicability of Article 132 was assumed as a

1. (1901) I. L. R. 25 M. 587.
2. (1901) 14 C. W. N. 122.
3. (1905) I. L. R. 32 C. 719.
4. (1913) I. L. R. 38 M. 321.
5. (1909) I. L. R. 33 M. 308.
6. (1908) I. L. R. 35 C. 298.

matter of course. In the cases of *Behari Lal* v. *Harakumar* [1], and *Suresh Kanta Banerji Chowdhree* v. *Nawab Ali Sikdar* [2], the point did not arise and *Troilokya* v. *Abinashi* [3], merely follows the ruling in *Hafezuddin Mandal* v. *Jadu Nath Saha* [4].

With reference to the alternative provided for in the third column of Articles 88 and 89, namely, demand and refusal, it is by no means easy to say what kind of non-response on the part of the agent will amount to a refusal. With due deference, we venture to doubt whether the learned Judges have not gone too far when they hold that an omission on the part of the agent to explain accounts submitted by him (when such explanation has been demanded by the principal) amounts to a refusal within the meaning of the article. The reference to Art. 115 at p. 259 of the report is evidently a slip.

Harinath Chowdhury *v.* **Haradas Archarjya Chowdhury**: I. L. R. 43 C. 269.

We feel little doubt as to the correctness of the conclusion in this case but we are by no means sure as to the soundness of the reasons assigned therefor. We beg leave to doubt if the case bears any analogy to *Marriott* v. *Hampton* [5] and if it does, whether it can be distinguished in the way that is attempted. In the present case, there had been no *adjudication* as to the right to the money and by mistake, the court had given away the money in its custody to somebody before deciding the question of his right to it and the payment had been made without notice to the person who had deposited the money. It is difficult to see where the rule in *Marriott* v. *Hampton* [5] comes in. The obvious course, when the mistake was pointed out, was for the Court to call upon the person who had drawn the money to bring it back into Court. It would be a lamentable state of the law if a suit were necessary for the purpose. And if a suit is instituted at all, it will be covered by the ordinary Count for money had and received. The fact that the money has been drawn from the Court instead of from any private person can make no difference in the circumstances.

Once however it is found that the money was paid in pursuance of a decision by the Court, after notice to the opposite party, we venture to doubt if the question of *bona fides* really has any place.

1. (1912) 21 C. L. J. 458.
2. (1915) 21 C. L. J. 462.
3. (1914) 21 C. L. J. 459.
4. (1908) I. L. R. 35 C. 298.
5. (1797) 7 Term Rep. 269.

The circumstances under which a decree can be set aside on the ground of fraud had been elaborately examined by this Court in *Chinnayya* v. *Ramanna*[1] and in the face of that decision it will be impossible to maintain that want of *bona fides* on the part of one of the litigants will avail to get rid of the plea of *res judicata.* As to the decision in *Ward and Co.* v. *Wallis* [2] we cannot help thinking that such a decision could not have been obtained in this country. A person who had a claim for a certain amount against another, erroneously gives credit for an item not really in existence and sues for the balance. He gets a decree for the suit amount by consent and is paid. He then finds out his mistake and sues again for the sum wrongly given credit for. It is not even said that the defendant was in any way responsible for the plaintiff's mistake but only that he was aware of it. The law of *res judicata* in this country, with explanation 4 to S. 11 and the rule in O. 2 R. 2, seems to us an insuperable bar to plaintiff's recovery in the second suit. Cases like *Gorachand* v. *Basanta Kumar* [3] and *Batul Kunwar* v. *Munni Lal* [4] afford no true parallel. Whether he could have obtained a review of the first judgment is another matter, which it is unnecessary here to discuss.

Bilasiram Thakurdas *v.* **Gubbay** I. L. R. 43 C. 305.

One of the points dealt with in the decision related to the principles on which damages are to be assessed in case of anticipatory breach of contract. Both counsel and the Court seem to have proceeded on the footing of the applicability of English cases and the question raised in the *Kistna Jute Mills Co.'s Case* [5], that the rule under the Indian Contract Act should be different from that obtaining in England does not, so far as one is able to judge from the report, appear to have been argued or considered.

Zamindar of Challapalli *v.* **Somayâ:** I. L. R. 39 M. 341.

The point in this case is one of considerable importance to Zamindars and their tenants and can, by no means, be said to be free from difficulty. The solution of the question depends on the right construction of Ss. 2, Cl. (10), 8 cl. (1) (3) and 185 of the Estates Land Act. While S. 181 lays down that nothing in the

1. (1913) I.L.R. 38 M. 203. 2. (1900) L. R. 1 Q. B. 675.
3 (1911) 15 C. L. J. 258. 4. (1910) I. L. R. 32 A. 625.
5. (1910) 21 M. L. J. 182.

Act shall prevent the landholder from converting his private land into ryoti land, there is no section laying down the converse, that is, that landholder may convert his ryoti land into private land. S. 185 lays down a presumption against land being private land and prescribes somewhat stringently the kind of evidence available for proof of land being private. S. 8 Cl. (1) expressly says that the union of melwaram and kudivaram in one hand shall not have the effect of converting the land into private land. Thus, it is perfectly clear that the policy of the Legislature is to keep private land within strictly narrow limits, possibly within the limits indicated by Mr. Justice Seshagiri Aiyar. But have they really succeeded in so doing? We think not. S. 3 cl. (13) defines private land as domain or homefarm land * * * by whatever designation known. There is no indication as to the point of time at which the land should be homefarm to deserve the appellation of private land. S. 8 cls. (1) and (3) furnish the only indications in the Act towards fixing the period but they cannot obviously justify the sweeping generalisation that no ryoti land can become private land as neither of these clauses refers to waste land, nor if one interpretation of the clause should find acceptance cases of relinquishment or surrender. Again, if the history of any home farm land should be traced sufficiently backwards, it must necessarily have been at one time waste land, surrendered land or land otherwise acquired. In the absence of any definite indication in the Act fixing the time at which private land should bear the character of "home farm" there seems to be no justification for so fixing it and we should think the right test is—was the land homefarm land at any time, not homefarm nominally in the accounts or temporarily for want of tenants or colorably as a device to defeat the policy of the law in favour of the tenants but *bona fide* and permanently. Once it is proved that the land has acquired that character, no temporary cessation of private cultivation will deprive it of that character and the appropriate question when there has been letting of such land will be—has the landlord the *animus revertendi* so to say or has he abandoned his intention of having it as homefarm? In the case of immemorial private land, possibly stronger evidence would be required for the property to shed its character of private land than in the case of ryoti land acquiring that character.

NOTES OF INDIAN CASES.

Bhupendra Krishnaghose *v.* Amarendra Nath Dey, I. L. R. 43 C. 432 (P. C.).

One of the questions raised in this case was whether the interest which an adopted son acquires as heir of his father (and not under his will) can be limited or defeated by any provisions in the father's will. The point was suggested as early as in *Bhoobun Moyee's case*, but it was then left open. The Courts in India held that this could be done, but their Lordships have avoided deciding that point, by holding that in the case before them the estate was vested in the widow during her life-time and not in the adopted son. The will authorised successive adoptions by the widow and went on to provide that if she died without adopting a son or if such adopted son pre-deceased her, without leaving any son the estate should go over to his nephews. Their Lordships point out that the successive adoptions contemplated by the testator cannot be carried out unless the estate was held to remain with her during her life-time and they also lay stress on the fact that she was appointed executrix. It is no doubt open to a testator to postpone the vesting of the property in the adopted son, but in view of the well-known habits and notions of Hindus, we respectfully venture to think that it would have required much clearer language than is found in the will in question to lead one to the conclusion that in spite of an adoption the widow was intended to continue to be the owner. The conclusion also seems to us inconsistent with the last portion of the will (omitted in their Lordships' judgment but set out in the report in the lower court, *Bhupendra Krishna Ghose* v. *Amarendra* [1] whereby the widow is authorised during her life-time to receive Rs. 300 a month from the estate in lieu of her maintenance. The appointment of the widow as executrix will not vest in her the beneficial interest. It would be an interesting matter for speculation whether if the widow had made a second adoption after the first son had pre-deceased her—leaving his own widow surviving, their Lordships would have upheld the second adoption.

Jamal *v.* Moolla Dawood Sons & Co.: I. L. R. 43 C. 493 (P. C.)

This case lays down the limits of the rule as to the duty of a party complaining of a breach of contract to take steps to

1. (1918) I. L. R. 41 C. at p. 643.

mitigate his damage. It may seem at first sight somewhat anomalous that a party who has *ultimately* benefited by a breach of contract should be able to recover damages for the breach: but as their Lordships point out the right to damages as well as the duty to mitigate has to be decided as at the date of the breach and subsequent events have no bearing on the question.

Musahar Sahu v. Lala Hakim Lal: I. L. R. 43 C. 521 (P. C.)

It is to be regretted that their Lordships' Judgment makes no reference to the question of the proper frame of a suit impeaching a transaction as being in fraud of creditors. The judgment of the High Court relied amongst other things on certain obervations in *Chatterput Singh* v. *Maharaj Bahadur* [1] as being in support of the view that the question must be raised only by a representative suit. The observations of their Lordships in that case are far from clear and they must continue to exercise the minds of Indian Courts until their Lordships avail themselves of an opportunity to explain them or lay down the law in clearer terms. On the question of substantive law their Lordships recognise the distinction between an intention to defeat a particular creditor and an intention to defeat creditors generally and they hold that it is only the latter that is obnoxious to S. 53.

Bank of Bengal v. Ramanathan Chetti, I. L. R. 43 C. 527 (P. C.).

The decision in this case turned wholly on the question whether the particular transaction was within the limits of the agent's authority, on the true construction of his power of attorney. But we would in passing invite attention to one observation of their Lordships, which is not always sufficiently borne in mind, *viz.*, that if authority is established, the mere fact that the principal did not receive any benefit does not rid him of his liability.

Sri Rajah Rama Rao v. Raja of Pittapur, I. L. R. 39 M. 396.

The basis of the junior member's right to maintenance is no doubt, his status as a member of the family of the holder for

1. (1904) I. L. R. 32 C. 198 (P. C.)

the time being but if he had a valid right as against the last holder, it is somewhat difficult to see how that right could be defeated by a gift especially seeing the donee was a universal donee. But the law as to impartible estates, it must be confessed, is in an amorphous condition and it requires more than ordinary courage to venture to predict what view is likely ultimately to prevail. The Judicial Committee is largely responsible for this state of affairs; for it is owing to the somewhat *partial* views their Lordships were disposed to take of the question, that this confusion has resulted. Fully aware of the practice of awarding maintenance to junior members, their Lordships did not deem it fit in *Sartaj Kuari* v. *Deoraj Kuari* [1] to explain the legal basis of that right. Again, notwithstanding that in that case their Lordships clearly negative co-parcenary rights in an impartible estate they keep on in later cases using the terms joint, joint family and survivorship with reference to it: *Jogendra Bhupati* v. *Nityanand Mansing* [2]; *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* [3]; *The Udayarpalayam case* [4]; *Lakshmi Devi* v. *Dhatraz* [5]; *Ram Nandan Singh* v. *Janki Koer* [6]; *Raja Yarlagadda* v. *Raja Yarlagadda* [7]; see *Thirumal Rao Saheb* v. *Rangadhani Rao Sahib* [8]. Though in *Raja Yarlagadda* v. *Raja Yarlagadda* [7] their Lordships seem to be clear that the mere fact that partible property of the family has been divided would not affect the family status in respect of the impartible property, still in *Thakurani Tarakumari* v. *Chaturbhuj Narain Singh* [9] it is laid down that rights of inheritance would not survive such a division. The conclusion in the last case was arrived at, so far as one could judge, without reference even to *Raja Yarlagadda* v. *Raja Yarlagadda* [7]. As it is, confining the authority of each case to the point actually decided, after such partition *quoad* the estate the family would be joint for purposes of maintenance but *separate* for all other purposes. Doubtless, a most unsatisfactory condition of things!

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1. (1888) I. L. R. 10 A. 272. (P.C.)
2. (1890) I. L. R. 18 C. 154. (P.C.)
3. (1900) I. L. R. 24 M. 377.
4. (1905) I. L. R. 28 M. 508.
5. (1897) I. L. R. 20 M. 256.
6. (1902) I. L. R. 29 C. 828.
7. (1900) I. L. R. 24 M. 147.
8. (1912) 23 M. L. J. 79.
9. (1915) 29 M. L. J. 371.

Venkata Subba Reddi *v.* Bagiammal, I. L. R. 39 M. 419.

It may be that the mortgagee may proceed against any portion of the mortgaged property relinquishing his claim against the balance but we do not think that Mr. Justice Napier has succeeded in establishing that on this question it is unnecessary to refer to English Law, for it is obvious that showing that there is nothing in the Transfer of Property Act against that course is not the same as establishing that the mortgagee has the right to follow that course and S. 44 of the Contract Act has reference only to joint-promisees and does not directly bear on the question of joint liability of properties.

Narayanan *v.* Lakshmanan : I. L. R. 39 M. 456.

As their Lordships observe, the Limitation Act merely prescribes within what periods suits should be brought and cannot be construed as of itself creating as obligation to sue where none existed and art. 91 would bar an action for possession only where the party suing is bound under the law to set aside the deed he has executed before he can recover the property, *Janki Kunwar* v. *Ajit Singh* [1], *Malkargen* v. *Narhari* [2]. An alienation of the trust office is clearly void and there is no duty under the law to set it aside. The conclusion of their Lordships on this point seems to be unexceptionable.

But the same cannot be said of their decision on the application of the analogy of S. 32 of the Trusts Act to the case of public religious trusts. Owing to the inalienability of the property forming the subject-matter of such trusts, the remedy would be in the highest degree illusory and in addition, the conclusion would seem to be opposed to the judgment of the Privy Council in *Peari Mohun Mukerji* v. *Narendranath* [3]. Their Lordships there upheld the judgment of the High Court giving a decree against the estate. Even in the case of private trusts, the exact meaning of S. 32 is doubtful. The Legislature seems to have copied the direction in *Darke* v. *Williamson* [4] without taking care to define the true meaning of such a direction. A possessory lien even in the case of a rightful trustee, *a fortiori* in the case of a trustee *de son tort* should be unthinkable and their Lordships did right in negativing it.

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1. (1887) I.L.R. 15 Cal. 58.
2. (1900) I.L R.25 B. 337 (P.C.)
3. (1909) I.L.R. 37 Cal. 229 (P. C.)
4. 25 Beav. 622.

NOTES OF INDIAN CASES.

Yenkatachalam Chetty *v.* Narayanan Chetty, I. L. R. 39 M. 376.

Assuming that Art. 115 does not apply to actions by a principal against his agent for money received by the latter to the principal's account, there is no valid reason for not applying Art. 116 when the contract between the principal and agent is in writing registered. If suits within Art. 89 are suits for compensation for breach of contract to account, then Art. 115 will not apply because contracts already provided for are taken out of its operation. There being however no similar restriction in Art. 116, that article will apply. Of course, it may with force be argued that an action for moveable property which the agent is bound to hand over to the principal cannot be viewed as a suit for compensation for breach of contract express or implied, such a suit differing in substance from a suit for money on a bond which is a suit for compensation. In the view above indicated, the application of Art. 115 will not be excluded. At any rate, Art. 89 cannot apply when under the contract, the principal is not entitled to call upon the agent to pay the amount earlier than the stipulated time. Art. 89 in our opinion stands to Art. 115 in a relation somewhat analogous to Art. 62. It is open to the party entitled to frame his action so as to bring it under the one article or the other as it suits him.

As rightly pointed out by the learned Judges in this case, argument that because the duty to account subsists, the agency also must be taken to subsist is obviously fallacious, for that duty subsists, subject to the conditions prescribed by the Limitation Act even after the cessation of the agency. The test suggested for determining whether the agency has ceased, *viz.*, the ceasing of the agent to represent the principal, though a fairly useful test is not at all a comprehensive test for the obvious reason that the failure to represent the principal cannot be conclusive as to his *capacity* to represent the principal which alone really matters for the purposes of the article. Renunciation by the agent being as effectual to terminate the agency as revocation by the principal, failure to represent has a larger bearing on the question than if the principal's act were the only determining factor.

Vellayan Chetty v. Mahalinga Aiyar: I. L. R. 39 M. 387.

Unlike the English O. 17, r. 2, which gives a discretion to the Courts—see *Ballard* v. *Millner* [1], O. 22, r. 4 Cl. (1) Civil Procedure Code prescribes that on the death of the sole defendant or one of the defendants, the Court, on an application made in that behalf, shall cause the legal representative to be made a party and shall proceed with the suit and if no application is made within the time limited the suit shall abate against the deceased defendant. The judgment under review does not indicate how the imperative provision of O. 22, r. 4 cl. (1) is to be got over, or the rule as to abatement in cl. (3) which operates as a matter of course without any act of the Court. We should think that the effect of order 22 is to effect a stay of all proceedings in the suit so far as the deceased person is concerned, whether for or against him and any act done in the interval would be of no legal validity cf. *Duke* v. *Davies* [2]. But whether a decree if passed could be collaterally impeached is quite another matter. It is equally another question whether the other side will be entitled to a rehearing when the representative does not claim one. It will be noticed that in *Debi Baksh Singh* v. *Habib Singh* [3], the argument in the lower court was that the rules of Order 22 as to addition of representatives applied only when the suit is pending and not after it has terminated by an order of the Court. Their Lordships however consider Order 22 applicable and as regards the order, hold that the court has power to rectify a mistake inadvertently made.

Lakshmi Achi v. Subbarama Aiyar, I. L. R. 39 M. 488.

There is no appeal against an order under R. 5 of O. 22 or any of the rules as to joinder of parties in O. 1 or 31 but if the refusal of the application has the result of putting an end to the suit, an appeal would lie as from a decree and the question may be raised in appeal—*Subbayya* v. *Saminadhayyar* [4]. This apparently was not a case like that. If by the act of the executor title in the property had become vested in the legatee during the life time of the executor (an aspect of the case referred to in the argument but not in the judgment), we should think that the case would have come under R. 10 of O. 22 unaffected by the circumstance of the death of the executor.

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1. (1895) W. N. 14.
2. (1893, L. R. 2 Q. B. 260.
3. (1913) I. L. R. 35 A. 331 (P. C)
4. (1895) I. L. R. 18 M. 496.

NOTES OF INDIAN CASES.

Nagindas Bhagwandas *v.* **Bachoo Hurkissondas**: I. L. R. 40 B. 270. (P. C.)

The decision of their Lordships is, of course, final; but the case is interesting as an illustration of the way in which the Hindu Law texts have sometimes fared at the hands of Orientalists and of Judges, who have had to look to them for light. The point for decision was as to the share taken by an adopted son in a partition with his adoptive uncle, in respect of the grand-father's estate. It is, of course, now too late in the day to go back to the numerous conflicting texts which ascribe different positions to the adopted son in the scale of subsidiary sons. The modern partiality for the adopted son has placed him on a footing of almost complete equality with the natural born son. The restriction as to share, imposed by the text of Vasishta, in a case of partition between an adopted son and a subsequently born aurasa son has however been recognised by the Courts, but that text does not in terms cover the question now under consideration. Among Sanskrit writers the only author dealing with it is the writer of the Dattaka Chandrika (S. V, para. 25). In the opinion of Indian Sanskritists and of many Indian Judges (including Sir John Edge himself) his authority is very low. But the Privy Council have taken a different view, and Sir John Edge, now as the mouthpiece of the Privy Council, accordingly proceeds on the footing that the case has to be determined with reference to that text.

With all respect, we are obliged to say that it is well nigh impossible to follow their Lordships in their interpretation of the passage. The translation by Mr. Sutherland even with the emendation thereof in *Raghubanand Doss* v. *Sadhu Churn Doss* [1], is unfortunately inaccurate and a comparison of that with the translation by Sir Ramakrishna Bandarkar (set out in their Lordships' judgment) will make it clear that Mr. Sutherland's translation fundamentally varies the meaning of the text. The opening sentence of S. 25 is obviously mistranslated by Mr. Sutherland and his interpolation of the words 'as a general rule' in the middle of the paragraph and of the words "the

1. (1878) I. L. R. 4 C. 425.

adopted son of one adopted" towards the end, has unfortunately clearly misled many. The text itself runs as follows :—

एवं धनिनः पुत्रान्तरसत्त्वे मृतपितृकस्य दत्तकपौत्रस्यापि दत्तोचितांशभागित्वं तदसत्वे सर्वहरत्वमपीति ।

न च पौत्रस्य स्वपितृयोग्यांशनियमात् दत्तकस्यग्रहीतुः पितामहौरसत्वे तादृशपितृव्यतुल्यस्यैवांशस्य तद्योग्यत्त्वाद्दत्तकपौत्रः पितृव्य तुल्यमेवांशं लभतामितिवाच्यं । पुत्रस्यदत्तकत्वे चतुर्थांशः पौत्रस्य तु तथात्वे समानांशः इति वैषम्यात् ॥

ततश्च स्वसमानरूपस्य पितुर्यादृशांशः शास्त्रसिद्धः तस्यैव स्वपितृ योग्यांशतेति यथोक्तमेव साधु.

In the well known way of sanskrit writers, the last passage re-affirms the proposition laid down in the first passage; the intermediate passage contains the opponent's argument and the author's refutation thereof.

It is somewhat singular that their Lordships proceed to decide the case on the assumption that even as translated by Sir Ramkrishna Bandarkar, this passage is not inconsistent with the view they take. It is impossible to accept the suggestion that the author is here contrasting the case of a competition between an adopted son of a natural born son and that natural born son's natural born brother with the case of an adopted son of an adopted son competing with a natural born son of his adoptive father's adoptive father. If *ex hypothesi*, both father and son had come in by adoption the reference to स्वसमानरूपस्यपितुः is meaningless. The author is laying down that in the case of a grandson by adoption the 'father's share' means the share that would have been due to the father if he had been of the same kind as the son himself. We cannot help feeling that the Privy Council have been misled by Mr. Sutherland's translation and by the fact that Vasishta's text deals only with a case of competition between sons of the *same* father. Paragraph 25 of S. 5 of the Dattaka Chandrika is really not an illustration of the application of Vasishta's text but an extension of it on grounds of logic and congruity.

As for the Indian cases, the decision in *Tara Mohum* v. *Kripa Moyee* [1] is clearly based on Mr. Sutherland's rendering. Those in *Dinonath* v. *Gopal Churn* [2] and *Surjokant* v. *Mohesh Chunder* [3] only hold that this rule of the Chandrika has no application to cases where an adopted son and a natural born son claim to

1. (1868) 9 W. R. 423. 2. (1881) 8 C. L. R. 57.
3. (1882) I. L. R. 9 C. 70.

inherit as distant collaterals and daughter's sons respectively. In *Dinonath's* [1] case, the learned judges, though they purport to follow the decision in *Tara Mohun* v. *Kripa Moyee* [2] expressly say at the end that the true meaning of Ss. 24 & 25 of S. 5 of the Dattaka Chandrika is that an adopted son and the adopted son of a natural born son stand in the same position. In *Raja* v. *Subbaraya* [3] the learned judges no doubt expressed a doubt as to the correctness of the interpretation in *Raghubanand's* case, but the grounds for the doubt are not even indicated. The actual decision in *Raja* v. *Subbaraya* [3] that among sudras the adopted son and the *aurasa* son share equally has now been dissented from (*Karuturi* v. *Karuturi* [4].

Among text-writers, Mr. Mayne has obviously been misled by Mr. Sutherland's translation when he says that the commencement of para. 25 lays down explicitly that the adopted son of one natural son inherits equally with the natural born brother of such son (Hindu Law, S. 170); and this leads him on to the view that the rest of that paragraph deals with the case of the adopted son of an adopted son. Messrs. West and Buhler do not notice this text particularly, but in a note at p. 372, they observe that the decision in Raghubanand's case (which however is not very accurately stated) would not be right on the principle of an adopted son fully representing his father in the absence of a natural son.' Mr. Ghose (Hindu Law, p. 614) considers that the decision in *Raghubanand Doss* v. *Sadhu Churn Doss* [5] may be correct in the main. Mr. Sarkar also (Law of Adoption, 2nd Ed. p. 400) approves of the view there taken as to the effect of the passage in the Dattaka Chandrika, but he is of opinion that the rule is applicable only to cases of 'inheritance' properly so called, and not to those governed by the Mitakshara doctrine of right by birth. But, as against this it must be remembered that the text of Vasishta (restricting the adopted son's share as against an after-born aurasa son) is as much in conflict with the 'right by birth' theory, yet it is accepted by the author of the Mitakshara; and when the Mitakshara deals with partition, it treats of the partition both of the ancestral property of the father and of his self-acquired property; and the right by birth is allowed to the son in both kinds of properties. As to the

1. (1881) 8 C. L. R. 57.
2. (1868) 9 W. R. 423.
3. (1883) I. L. R. 7 M. 253.
4. (1915) 29 M. L. J. 710.
5. (1878) I. L. R. 4 C. 425.

effect of the doctrine of 'representation', *i. e.*, that the son would take whatever the father would have taken, we venture to observe that the Mitakshara in Ch. I, S. 5 is only laying down the rule of *stirpital* division and it cannot be understood as providing that the 'share' of the father devolves on the son. Such a notion is obviously inconsistent with the settled rule that if after the death of one son but before the date of partition, other sons die without leaving issue, the son (if any) of the first predeceased son would take an increased share according to the number of branches existing at the date of the partition.

Bhaskar Gopal *v.* **Padman Hira**, I. L. R. 40 B. 313.

The learned judges do not seem prepared to follow the extreme view taken in *Sibendra Pada Banerjee* v. *Secretary of State* [1], as to the inapplicability of the rule as to 'delivery' in S. 54 of the Transfer of Property Act to cases in which the vendee is already in possession. But they hold that as the vendee was in possession as a tenant, the vendor had only the 'reversion' to sell, and that can be transferred only by a registered instrument. This would no doubt be so where a landlord seeks to transfer the reversion to a third person, but we are not sure if the transaction should be regarded in the same light even when the transfer is from the lessor to the lessee, for as between them an 'implied surrender' is possible under the law. We rather think, it would depend upon the nature of the transfer in each case, whether the tenant retains his term and takes only a transfer of the reversion or surrenders his term (by implication) and takes a sale of the property itself. In the latter case, a registered document will not be necessary when the property is below Rs. 100 in value. In the Bombay case, the appellant may nevertheless have failed as against the later transferee (who had purchased under a registered instrument) by the operation of S. 50 of the Registration Act.

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1. (1907) I. L. R. 34 C. 207.

NOTES OF INDIAN CASES.

Kishan Lal *v.* **Sultan Singh :** I. L. R. 38 A. 5.

The Court has no power to dismiss a suit because it has reason to believe that the plaintiff is keeping back certain valuable evidence. It is only if the plaintiff admits possession of a document and fails to comply with the order of the Court for inspection, that the suit can be dismissed for default of prosecution. If the court has reason to believe that a party is keeping back documents the court is entitled to draw adverse inferences against the party so withholding but it cannot dismiss a suit.

Madho Ram *v.* **Nihal Singh :** I. L. R. 38 A. 21.

Before the recent Privy Council decisions which have settled the question, three different views prevailed in India as regards the nature of and the limitation applicable to applications under the Transfer of Property Act for an order absolute for sale. The view held in Madras was that the preliminary decree was the real and only decree in the case, and all subsequent applications for whatever purpose made were only applications in execution to which under certain circumstances, that is to say whenever the third column of art. 179 would be inapplicable, art. 178 would apply but otherwise art. 179 would be applicable. See *Mallikarjanudu Setti* v. *Lingamurthi Pantulu & etc.*,[1] *Vadapuratta* v. *Vallabha Valiya Raja*[2] *Rangiah Gounder* v. *Nanjappa Rao*[3]. The final decree did not in that view afford any fresh starting point for limitation. The view taken in Allahabad, on the other hand, was that though the application for order absolute was really an application for execution, there would be a fresh start for limitation from the final decree. The Calcutta High Court was of opinion that the application for an order absolute was in fact only an application in the suit which would be pending till the final decree was passed and that such an application being under the Transfer of Property Act and not under the Civil Procedure Code to which alone art. 178 or 179 would apply, neither of those articles applied and the application could be made

1. (1900) I. L. R. 25 M. 244. 2. (1901) I. L. R. 25 M. 300
3. (1903) I. L. R. 26 M. 780.

at any time. (See *Tiluck Singh* v. *Parsotin Pershad* [1] *Madhabmani Dassi* v. *Lambert* [2] *Rahamit Karin* v. *Abdul Karin* [3].) The effect of the recent Privy Council decisions in *Ashfaq Husain* v. *Gauri Sahai* [4] *Batuk Nath* v. *Munni Dei* [5] *Abdul Majid* v. *Jawahir Lal* [6] *Munna Lal Panash* v. *Sarat Chander Mukerji* [7] would seem to be to affirm the view of the Allahabad High Court and to hold that the preliminary decree and the final decree afford fresh starting points of limitation including that prescribed by sec. 48 C. P. C. See *Venkatamma* v. *Manikkam Nayani Varu* [8]. Neither *Batuk Nath* v. *Munni Dei* [5] nor *Abdul Majid* v. *Jawahir Lal* [6] however affects *Rangiah Gounden & Co.* v. *Nanjappa Rao* [9] so far as it applies art. 178 to certain applications for order absolute as in both those cases there was an appellate decree confirming the original decree from which limitation could run under art. 179. There is no scope for such differences of opinion under the new Code. The applications are applications in suits and not being in the nature of reminders to the Court of its duty to terminate the suit but applications requisite under the law as preliminary to Court's further action, art. 181 would appropriately apply to them. As regards the starting point for art. 181, in ordinary cases when there is no appeal, there would be no difficulty and it would be on the expiration of the period fixed for payment. Their Lordships hold in this case that the same would be the case even when there has been an appeal when the appeal judgment affirms that of the Court below. It could not be denied that if the appellate Court varied the decree in any particular, there would be a fresh right to apply on the appellate decree and we fail to perceive why it should be different when the appellate judgment is an affirming judgment. On the true theory of appeals, the Lower Court's decree becomes merged in that of the Appellate Court and the only operative decree thereafter is the appellate decree *Krishnamachariar* v. *Mangammal* [10]. Such being the case, it is but right that limitation should run only from the appellate judgment. The ratio of *Ashfaq Husan* v. *Gauri Sahai* [4], also would seem to support

1. (1895) I. L. R. 22 C. 924.
2. (1910) I. L. R. 37 C. 796.
3. (1907) I. L. R. 34 C. 672.
4. (1910) I. L. R. 33 A 264.
5. (1907) I. L. R. 36 A. 284.
6. (1904) I. L. R. 36 A. 350.
7. (1914) I. L. R. 42 C. 776.
8. (1914) 17 M. L. T. 399 = 26 I. C. 214.
9. (1901) I. L. R. 26 M. 780.
10. (1902) I. L. R. 26 M. 91.

this conclusion. Somewhat analogous questions have arisen in respect of applications to revive execution applications struck off, applications by way of restitution and the Courts have held that limitation commences from the final decree or order and not from the original decree or order *Sheikh Mahomed* v. *William Alfred Thomas* [1]. A similar view has also been taken with reference to the effect of decrees in connection with arts. 62, 97 and 120. *Rajagopalan* v. *Thiruppanandal Thambiran*[2] *Bassu Khan and others* v. *Dhurn Singh.*[3]. But the point is by no means clear.

Sital Prasad *v.* **Lal Bahadur**: I. L. R. 38 A. 75.

A petition which merely recites an adjustment would obviously not require registration but whether apart from the decree, the adjustment so proved could be relied upon depends upon the nature of the adjustment. If the adjustment amounts to a transaction for whose validity a registered writing is essential, the adjustment cannot be relied upon but if the adjustment is nothing more than a compromise of a doubtful right, it does not require registration, not being one of the transactions for which writing is required by the Transfer of Property Act. If the petition instead of merely reciting an adjustment purports itself to be a record of the adjustment, then how far the petition can be relied upon is a question of great difficulty on which judges have widely differed, see *R. P. Chelamanna* v. *R. P. Rama Row* [4]. Whether a petition merely recites an adjustment or in itself is the record of adjustment, is one depending upon the facts of each case but on which considerable difference of opinion is possible.

Abid Ali *v.* **Imam Ali**: I. L. R. 38 All. 92.

Notwithstanding the strong expression of opinion of Mr. Amir Ali in the course of the argument in *Matadin* v. *Sheik Ahmed Ali* [5] the Courts in India have recently shown a tendency to recognise the principle of *de facto* guardianship even under the Mahomedan Law. *Mafazzul Hosain* v. *Basid Sheikh* [6] *Ram*

1. (1911) 11 I. C. 972.
2. (1907) 17 M. L. J. 149.
3. (1888) I. L. R. 11 A. 47.
4. (1910) I. L. R. 36 M. 46.
5. (1912) M. W. N. 183 (P. C.)
6. (1906) I. L. R. 34 C. 36.

Charan Sanyal v. *Arukul Chandra Acharjya* [1] *Ayder man Kutti* v. *Syed Ali* [2]. In the last named case Mr. Justice Abdur Rahim shows that that principle is recognised by the Mahomedan Law and reference to principles of equity is unnecessary and considers the limits of such concession. Of course the powers of the *guardian-de-jure* himself are very restricted under the Mahomedan Law and a *de facto* guardian cannot claim larger powers and necessity under the Mahomedan Law necessarily has a different connotation from that under the Hindu Law. Even in cases under the Hindu Law, alienations by *de facto* guardians (not being natural guardians) do not attract all the consequences of an alienation by *de jure* guardians (*Thayammal* v. *Kuppanna Kounden*)[3] and it may be questioned whether the rule as to inquiry justifying alienation can legitimately be extended to them.

Emperor *v.* **Lal Singh**: I. L. R. 38 All. 395.

The opposite construction adopted by the High Court of Bombay in *R.* v. *Kalubhai Meghabai*[4] and by our Court in *Uruma Mudali and others*[5] may no doubt lead to conflicting judgments but such a result is not provided against by the legislature in cases coming within S. 408 cl. (a) S. 411. The strongst argument is that the legislature had the interpretation placed by the Bombay High Court before it and yet did not make the point clear in the Act of 1898. On the other hand, the difference in language between S. 411 and S. 413 is noteworthy.

Kunwar Sen *v.* **Durbari Lal**,: I. L. R. 38 All. 411.

Obviously, mere entry of a man's name in the Revenue Register as the owner of a land cannot amount to adverse possession of the land but the further question decided namely that the equity of redemption which is not capable of possession cannot be adversely "possessed" has been otherwise decided in this court *Subramania Iyer* v. *Balasubramania Iyer* [6].

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1. (1906) I. L. R. 34 C. 65, 2. (1912) I. L. R. 37 M. 514.
3. (1914) 27 M. L. J. 285. 4. (1870) 7 Bom. H. C. Cr. cases. 35.
5. (1914) 16 M.L.T. 33=23 I.C 928. 6. (1913) 38 M. 933, (F. B.).

Ramacharan Lal *v.* Rahim Baksh, I. L. R. 38 A. 416.

The question in this case is the same as that in *Appandai Vathyar* v. *Bagubali Mudaliar* [1] but unlike the Madras High Court, the Allahabad High Court refused to attach any significance to *Pathakrama*. There is no question that in point of religious efficacy, the mother's brother's son is superior to the mother's sister's son but at the same time it cannot be denied that according to the popular notions, the relationship of the mother's sister's sons is closer than that of mother's brother's sons and this is reflected in the prohibition of marriage of the one and not of the other.

Chottey Lal *v.* Lakhmi Chand Magon Lal: I. L. R. 38 A. 425.

If the case pending before a Small Cause Court can validly be transferred to a court not having small cause powers, that court should be considered for the purpose of the suit, a court of small causes with the further result that the procedure of Small Cause Courts as well as the the revisional powers of the High Court becomes applicable to the such court quoad that suit. No doubt a somewhat anomalous state of affairs but the policy of S. 24 C. P. C. is for the legislature and not for the courts.

Radhika Prasad *v.* Secretary of State for India, I. L. R. 38 A. 438.

On an application for succession certificate, the right to the succession certificate is the only question that can legitimately be gone into *i. e.* the right of the applicant to represent the deceased person. The validity of the alleged claim of the deceased person is entirely beside the scope of the inquiry and the alleged debtors can have no locus standi. The indemnity that the succession certificate affords is against the claimants to the estate of the deceased. If the court undertakes to decide disputed questions between the debtor and the representative it is obviously arrogating to itself the functions of the court to try the suit for the alleged debt.

1. (1909) I. L. R. 33 M. 439.

Laxman Nilkant v. Vinayakkeshvi, I. L. R. 40 B. 329.

The question for decision in this case was whether the interest of a member in joint family property could be attached in execution of a money decree obtained against his brother in respect of a debt borrowed for the benefit of both. It does not appear whether or not the judgment-debtor was the managing member of the family. The learned judges hold that whatever may be the effect of a sale (if one had been allowed to take place), where the stage of sale has not been reached, there is no reason for assuming jurisdiction to dispose of property belonging to one not a party to the suit nor the representative of the judgment-debtor. It seems to us that the question has not been dealt with from the correct standpoint and it is noteworthy that the judgment makes no reference to the line of reasoning adopted in decisions like *Lallubhai* v. *Vijbukhandas Jagjivandas* [1], *Rangiah Chetti* v. *Thanikachella* [2] and *Nunna Setti* v. *Chidaraboyina* [3]. The Civil Procedure Code authorises the attachment in execution not only of property *belonging* to the judgment-debtor but also of that over which he has a disposing power which he may exercise for his own benefit. It is by virtue of this provision that in execution of a money decree against the father the interest of his sons in family property is allowed to be attached. And as pointed out by Subramania Aiyar, J. in *Rangiah Chetti* v. *Thanikachalla* [2] "if the son's share is property which the father has power to dispose of for his own benefit * * * * how can the share of any other undivided coparcener which the managing member can convey for debts incurred by him for legal necessity be treated differently?" In *Sardarmal* v. *Aranvayal Sabapathi* [4] which was a case arising out of the insolvency of the manager of a joint family (other than a father) Strachey, J. held that but for the vesting order the creditor could have attached and sold on account of a family debt, "not only the interest of the judgment-debtor but also the interests of the whole joint family of which he was the manager." In *Shiam Lal* v. *Ganesh Lal* [5] a son who had been impleaded in the suit against his father but as against whom the suit had been dismissed, sued for a declaration that his share

1. (1886) I. L. R. 11 B. 37. 2. (1895) I. L. R. 19 M. 74.
3. (1902) I. L. R. 26 M. 214. 4. (1896) I. L. R. 21 B. 205.
5. (1905) I. L. R. 28 A. 288.

in the family property was not liable to be attached in execution of the decree that had been passed against the father alone; but the court held that unless the debt was shown to be illegal or immoral the son could not prevent the attachment and sale of his interests as well. We see no warrant for the distinction between the stage before the sale and that after it. If the learned judges had definitely come to the conclusion that a sale in execution of a money decree against a managing member can never pass anything more than his personal interest *i.e.*, that *Hari Vithal* v. *Jayaram Vithal* [1] was not right, the position would then be different. But they leave that point open.

Hansa Godhaji *v.* **Bhawa Jogaji**: I. L. R. 40 B. 333.

Much as we appreciate the sentiment underlying this decision, we cannot help observing that the decision is irreconcileable with the clear language of O. 21, R. 2 and is at variance with the whole course of case law relating to that provision. The interpretation placed on the rule by Heaton, J. in *Trimbck Ramakrishna* v. *Hari Laxman* [2] was not concurred in by his colleague (Chandavarkar, J.) and stands alone. Fraudulent conduct on the part of judgment creditors, in ignoring adjustments outside court, may be a fit matter for punishment by criminal courts or may afford a basis for a claim for damages in separate proceedings but the policy of the law, so far as the *executing* court is concerned is unmistakeable. It is not for the courts to sit in judgment upon it, however much they may regret it.

Sitabai *v.* **Laxmibai**: I. L. R. 40 B. 337.

The question of jurisdiction raised in this case turns upon whether a widow's claim to have her maintenance charged upon certain immovable properties involves 'the determination of any right to or interest in immovable property' within the meaning of S. 16 (d) of the Civil Procedure Code. The view here taken is substantially the same as that adopted by the Madras High Court in *Sundara Bai Sahiba* v. *Tirumal Rao Sahib* [3], which however was decided under the corresponding provision in the Letters Patent. In the Madras case, the learned judges observed

1. (1890) I. L. R. 14 B. 597. 2. (1910) I. L. R 34 B. 575.
3. (1909) I. L. R. 33 M. 131.

that the right of maintenance is 'not merely a personal obligation. It is a real right but is not a charge or any other proprietary right until it is referred to specific property by contract or decree.' We feel some doubt as to the correctness of this description nebulous as it is, and we are not sure if the view that it is a 'real' right is consistent with the decision in *Kalpagathachi* v. *Ganapati Pillai* [1], that a release of a right to maintenance does not require to be registered. (For a full discussion of the nature of the right to maintenance see *Lakshman* v. *Satyabhama* [2].) In so far as there is a claim to have the maintenance charged on specific immovable property, the applicability of S. 16 (d) Civil Procedure Code to the case depends upon the connotation of the word 'determination' *viz.*, whether it covers the 'creation' of a charge by the decree to be passed or it signifies only an adjudication as to an 'existing' interest. In the latter view, it would be difficult to maintain that the person entitled to maintenance has an existing interest in the property sought to be charged (the question is left open by the Judicial Committee in *Roshan Singh* v. *Balwant Singh* [3]). But the wider interpretation is more in accordance with accepted principles as to jurisdiction over immovable property; for otherwise it may become necessary for a court to create by its decree a charge on property not situate within its jurisdiction. It may also be mentioned in passing that a claim to charge maintenance on specific immovable property was in *Dose Thimmanna Bhutta* v. *Krishna Jantri* [4] held to be a suit in which a right to immovable property was directly and specifically in question, within the meaning of the rule as to *lis pendens*.

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1. (1881) I. L. R. 3 M. 184.
2. (1877) I. L. R. 2 B. 494.
3. (1899) I. L. R. 22 A. 191, 199.
4. (1906) I. L. R. 29 M. 508.

NOTES OF INDIAN CASES.

The Municipal Board of Allahabad *v.* Tikanda Jang: I.L.R. 38 A. 52.

The Full Bench of our Court in *Natesa Aiyar* v. *Appavu Padayachi* [1] has taken the view that the deposit that is forfeited is not "a sum named in the contract as the amount to be paid in case of breach" within the meaning of S. 74 of the Indian Contract Act; in that view the vendor though bound to give credit for it is not restricted to that amount as compensation for breach. *The President of Vellore Taluq Board* v. *Gopalasami Naidu* [2]. This case is not in conflict with the decision of the Full Bench but proceeds upon the construction of the conditions of sale in the particular case. On a construction of those conditions, the Court came to the conclusion that the only penalty that was prescribed for non-payment of the purchase-money was the forfeiture of the deposit and that the vendor should have the right to resell. There was no clause that if on such resale, there should be deficiency, that deficiency should be made good by the vendee. The specific claim made in the case, *viz.*, the claim for the deficit might be got rid of that way but whether in the absence of an express clause in the contract his right to damages under S. 73 of the Contract Act could be so got rid of is certainly open to question.

Jibar Kunwar *v.* Gobind Das: I. L. R. 38 A. 56. (F. B.)

The decision in this case is obviously right. When in fact the parties are not co-owners, and they do not also purport to deal with each other as such, the mere fact that the result of the arrangement is that property is divided between two persons cannot make the transaction an "instrument of partition."

Barati Lal *v.* Salik Ram: I. L. R. 38 A. 107.

This is a case more or less upon the line but the conclusion is, we think, right. Here the daughter set up a limited right in herself; the brother's son contended on the other hand that the property belonged absolutely to himself. A compromise was entered into by which the brother's son, on receipt of consideration, gave up his right and agreed that the daughter should take absolutely. There were two ways in which the transaction could

1. (1913) I. L. R. 38 M. 178. 2. (1913) I. L. R. 38 M. 801.

be looked at; it could be looked at as an acknowledgment of the daughter's right as such daughter, with a promise by the reversioner not to claim succession or it might be looked at as a settlement which acknowledged the truth of the case of neither, and which neither was entitled to impeach relying on the case of the other. Their Lordships hold apparently that in neither view the brother's son was entitled to recover the property. That on the second view, he would not be entitled to succeed, we agree; but we do not at all feel sure that he would not be on the first. The distinction between agreement not to claim the right when it should fall in and a release of reversionary rights, is, we must confess, hardly a tangible one.

Dujai *v.* **Shamlal:** I. L. R. 38 A. 122.

From the point of view of common sense there is much to commend this judgment. Plaintiff says that he is the real mortgagee, his wife in whose name the mortgage deed stands being only a benamidar and makes her a party defendant. She does not object to his claim. Under those circumstances, if by the course adopted no defence of the other defendants (mortgagors) on the merits is prevented, it does not seem to be any concern of theirs as to which of them is really entitled. If for instance they could show that the suit was instituted by the plaintiff to avoid the plea of limitation, the wife not being available at the time of filing the plaint that may give them an interest in the question but in the absence of any such interest, it is difficult to see why they should be allowed to agitate it. Indeed, it has been held that an adjudication as between parties similarly situated is conclusive against third parties not interested in the question. *Ramamurthi Dhora* v. *The Secretary of State for India in Council* [1]. Convenient as this rule may be, we are afraid it is opposed to the judgment of the Privy Council in *Aumirtolall Bose* v. *Rajoneekant Mitter* [2]. Referring to a petition by the aunts of the plaintiff therein preferentially entitled to succeed (who were defendants in the case) in which they acknowledge the right of the plaintiff their Lordships say "the petition did not amount to a conveyance or a disclaimer of title but merely to an admission made more than six months after the commencement of the suit that the plaintiff was the real heir and that they had no defence to offer. It is clear that an admission or even a confession of

1. (1911) I. L. R. 36 M. 141. 2. (1875) 23 W. R. 214.

judgment by one of several defendants in a suit, is no evidence against another defendant. Suppose the real heir had been barred by limitation, she could not by her admission contrary to the fact that the plaintiff was the real heir, have bound the other defendants and thus have entitled the plaintiffs, upon a question of limitation to a deduction of the period of his minority to which she would not have been entitled herself."

Ram Baksh *v.* **Ram Lal**, I. L. R. 38 A. 217.

In applying *Subba Rao* v. *Rama Rao* [1] a point that is overlooked but has considerable bearing is that whereas under the Code of 1859 a party could not combine claims with respect to immoveable properties within different jurisdictions, without the permission of the Court under the later Codes, no such permission is needed. This change does cut out the root of the reasoning of in *Subba Rao* v. *Rama Rao* [1]. However that may be O. 2, r. 2 could not have barred the suit in this case. The right of a co-owner in joint possession to have partition is a continuing cause of action and the fact that he has omitted to sue at one time can't prevent him from suing at a later time. The case would be entirely different if there was an ouster at the date of the previous suit in which case, there would be no continuing cause of action at all, the cause of action accruing once for all when the dispossession took place. To this extent we think the statement that O. 2, r. 2 does not apply to partition suits requires qualification. In also another matter, we think the statement of law of Mr. Justice Walsh requires qualification. While it is true that "a right which a litigant possesses without knowing or having known that he possesses it can hardly be regarded as a "portion of his claim" *Amanath Bibi* v. *Imdad Hussain*, [2] the section "plainly includes accidental and involuntary omissions as well as acts of deliberate relinquishment" *Munshee Buzloor Ruheem* v. *Shumsoonissa Begum* [3].

Ganapat Rai *v.* **Multan**: I. L. R. 38 A. 226.

As Mr. Justice Mukherjea says in *Bhaiganta* v. *Himmat* [4] Ss. 115 and 116 of the Evidence Act may not be exhaustive and there may be other rules of estoppel, one of them being that a tenant is not entitled to deny the title of the landlord even after

1. (1867) 3 M. H. C. 376.
2. (1888) I. L. R. 15 C. 800 (P.C.).
3. (1867) 11 M. I. A. at 605.
4. (1916) 24 C.L.J. 103=20 C.W.N. 1335.

the determination of the tenancy. That is a perfectly intelligible position. The position taken in this case is however different and it is supported by the Privy Council decision in *Bilas Kunwar* v. *Desraj Ranjit Singh* [1] *viz.* that S. 116 directly governs. It must be confessed that a certain strain on the words of the section is needed to reach that result. Either the expression "continuance of the tenancy" is to be understood in a special sense or the duty to surrender must be taken to flow from the fact of the tenancy the legal effect of which cannot be destroyed by proof of title in others. The conclusion, however, is beyond the pale of controversy.

Ali Husain *v.* Hakin Ullah : I. L. R. 38 A. 230.

This seems to be an obvious case. On the one hand the benefit of the covenant could not run with the land reserved without an express assignment; on the other, the burden of the covenant could not run with the land sold as the covenant did not "touch or concern" the land.

Abdul Karim *v.* Islamunnissa Bibi : I. L. R. 38 A. 339.

At the first blush, the argument based on the similarity in the language of Art. 165 and O. 21, Rr. 100 and 103 might appear conclusive but on second thoughts it will be found that the arguments on the other side are by no means negligible. Art. 165 does not refer to R. 100, on the other hand while R. 100 speaks of applications by persons "other than the judgment-debtor" Art. 165 speaks of application by "person dispossessed." Again, the effect of R. 103 and S. 47 taken together, see *Ramaswami Shastrulu* v. *Kameswaramma* [2], is to compel persons other than the judgment-debtor not being transferees from him after institution of the suit (*e. g.*, purchasers in execution of decrees) to apply under R. 103 within the time limited by Art. 165. No valid reason can be suggested why those persons should be accorded a less favourable treatment than the judgment-debtor or his transferees. Lastly, the construction adopted by the Madras and the Allahabad Courts was before the legislature when the Act of 1908 was passed ; nevertheless the legislature allowed the old language to continue.

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1. (1915) I. L. R. 37 A. 557.

2. (1900) I. L. R. 23 M. 361.

NOTES OF INDIAN CASES.

Sonu Valad Khushal *v.* **Bahinibai**: I. L. R. 40 B. 351.

This is a case practically on all fours with *Dampanaboyina* v. *Addala Ramaswami* [1], though we find no reference to the Madras case, either in the arguments or in the judgment. The attempts made from time to time to define the expression 'cause of action' have done the cause of procedure more harm than good, for the language used in each case is necessarily such as to meet the particular objection to which prominence was given in that case. Undue stress is thus sometimes laid on the 'title of the plaintiff' as being the chief element in determining his 'cause of action' while in other cases more importance is attached to the 'infraction' thereof. But whatever the reason may be, few can help feeling that it does little credit to the judicial record of this country that in numerous cases a litigant has to pass through three Courts before he can feel sure that his suit has been properly framed.

Gangabai Peerappa *v.* **Bandu**: I. L. R. 40 B. 369.

The decision in this case that an illegitimate son among sudras can inherit even where he was born of a mother who had been married to another before her concubinage, must be taken to be limited to the Bombay Presidency; though even there, the right is denied if the illegitimate son is born during the continuance of the mother's married status. The Calcutta High Court went to the other extreme in confining the right of inheritance to one born of a 'female slave' (See *Kirpal Narain* v. *Sukurmoni* [2], *Ram Saran* v. *Tekchand* [3]), but even there the more recent tendency is towards the intermediate view, obtaining in Madras, of recognising a right of inheritance in one born of a permanent and exclusive concubinage See *Chathurbhuj* v. *Krishna Chandra* [4]. The Madras authorities are collected in the judgments in *Soundarajan* v. *Arunachalam* [5], and the Full

1. (1902) I. L. R. 25 M. 736.
2. (1891) I. L. R. 19 C. 91.
3. (1900) I. L. R. 28 C. 194.
4. (1912) 16 C.L. J. 335.
5. (1915) I. L. R. 39 M. 136. (F. B.)

Bench ruling has for the present set at rest the question raised by *Sundaram* v. *Minakshi* [1], whether if the mother was a dancing girl attached to a temple, the son can claim to inherit to his putative father even though born of an exclusive and continuous connection. It may also be noted that the Full Bench attach no importance to the circumstance (relied on by Seshagiri Aiyar, J.) that the woman was not a virgin when she became the concubine of the plaintiff's father.

On the question of the 'share' to be allotted to the illegitimate son when there are other heirs taking with him, the decision under notice is in conflict with the view adopted in Madras in a recent case *Visvanathaswami* v. *Kamalammal* [2]. In so far as reliance is placed in the last mentioned case on the Bombay decisions in *Kahi* v. *Govind* [3], and *Sheshgiri* v. *Gireva* [4], the observations thereon in the present judgment deserve notice. Even among the Madras authorities referred to, none of the earlier cases except perhaps *Chinnammal* v. *Varadarajulu* [5], had directly to decide the question of the extent of the 'share' of the illegitimate son and the decision in *Visvanathaswami* v. *Kamalammal* [2], seems to us fairly open to reconsideration, when the question should come up again. The argument on the basis of the Sanskrit texts is clearly stated in the decision under notice and even in the Madras case, the learned Judges admit that much may be said in favour of that view.

Shavakshaw *v.* **Tyab Haji Ayub**: I. L. R. 40 B. 386.

We wonder why no reference is made by Macleod, J. to the decision in *Harakhbai* v. *Jamnabai* [6], on the strength of which the application before him seems to have been made. It is anyhow clear that the two cases take divergent views as to the procedure to be followed by a party to a suit, when the subject matter thereof had since the institution of the suit been made the subject of an arbitration and award without the intervention of the Court.

1. (1912) 16 I. C. 787.
2. (1915) 30 M. L. J. 451.
3. (1875) I. L. R. 1, B. 97.
4. (1889) I. L. R. 14 B. 282.
5. (1892) I. L. R 15 M. 307.
6. (1912) I. L. R. 37 B. 639.

It is perhaps not altogether beyond doubt whether the jurisdiction of a court to decide a suit pending before it can be excluded except in one or other of the ways provided by statute. *Cf. Raja of Venkatagiri* v. *Chinta Reddi* [1]. We are inclined to agree with Davar, J. (in *Harakhbai's case*) in spite of the decision to the contrary in *Nanjappa* v. *Nanjappa* [2], that the arbitration sections of the Civil Procedure Code do not contemplate a reference in a pending suit except by order of the Court. See also *Venkatachala* v. *Rangiah* [3]. It seems also fairly clear that an agreement to refer, entered into *after suit* or even a reference made pursuant thereto cannot be specifically enforced or as such operate to bar the trial of the suit *Cf. Tincowry Dey* v. *Fakir Chand Dey* [4], *Rukhanbai* v. *Adamji* [5]. The decision in *Sadiq Hussain* v. *Fargir Begam* [6] does not seem to us to militate against this view; for there the compromise settled the rights of the parties and only left the working out thereof to certain arbitrators. The question remains, what is the effect of an award following upon the reference. *Lakshmana Chetti* v. *Chinnthambi* [7] cannot certainly be said to *decide* that the reference and the award amount to an 'adjustment' within the meaning of S. 375 Civil Procedure Code. *Pragdas* v. *Girdhardas* [8] and *Nanjappa* v. *Nanjappa* [2] are the only two authorities prior to *Harakhbai's case*, holding that the award can be given effect to under S. 375 Civil Procedure Code. The remarks of Beaman, J. (in *Rukhanbai's case*) on the decision in *Pragdas* v. *Girdhardas* [8] seem to us to have more force than the learned Judges who heard *Nanjappa* v. *Nanjappa* [2] were inclined to recognise. Where, at any rate, one of the parties does not accept the award, it is not easy to see how a Court acting under S. 375 can exercise the powers conferred by the sections of the code relating to arbitration, as for instance, to modify or correct the award or remit it for reconsideration; and, in spite of the remarks of Davar, J. in *Harakhbai's case*, we venture to doubt if the court can in such a case enquire into the objections to the validity of the award. Macleod, J. in the case under notice, cuts the Gordion knot by

1. (1912) I. L. R. 37 M. 408.
2. (1912) 23 M. L. J. 290.
3. (1911) I. L. R. 36 M. 353.
4. (1902) I. L. R. 30 C. 218.
5. (1909) I. L. R. 33 B. 69.
6. (1909) I. L. R. 33 A. 743; (P.C.)
7. (1901) I. L. R. 24 M. 326.
8. (1902) I. L. R. 26 B. 76.

holding that S. 89 of the new Code of 1908 has the effect of making the arbitration sections applicable to an award of the kind in question. It remains to be seen whether this view will find general acceptance.

Secretary of State for India *v.* Gulam Rasul; I. L. R. 40 B. 392.

Much as we sympathise with the endeavour to temper law by justice, we cannot help saying that the position taken up here on the strength of the observations in *Secretary of State* v. *Gajanan Krishnarao* [1] is somewhat illogical. If, as the learned judges hold, the language of S. 80, C. P. C. does not permit of an exception being made in the case of suits for injunction, it does not appear to be for the Court to make its application depend upon its view of the imminence of the injury threatened. The observations in *Secretary of State* v. *Kalekhan* [2] clearly incline to the contrary.

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1. (1911) I. L. R. 35 B. 362.
2. (1912) I. L. R. 37 M. 113.

NOTES OF INDIAN CASES.

Chandrika Baksh Singh *v.* Indar Bikram Singh, I. L. R. 38 A. 440. (P. C.)

Impertinent intervener in another person's affair is a catching phrase and will have the vogue for a long time to come but what exactly the case decides it is difficult to gather. Plaintiff wanted a declaration of title against the defendant and there was a declaration against him. Plaintiff was the party in possession. It is difficult to say whether this was what sufficed, in their Lordships' opinion, in the absence of title in the defendant to entitle the plaintiff to a declaration or the further circumstance that a declaration had been obtained against the persons really entitled and they had acquiesced in the decision. We apprehend that this latter aspect it was that weighed with their Lordships and in that view, the decision involves no departure from any previously accepted principles.

Fateh Chund *v.* Rup Chand, I. L. R. 38 A. 446, (P. C.)

"Maliki" is a term of art and denotes absolute title even though the grantee is a woman and the significance of the term is not abated or fortified by enumeration of the powers involved in it. The testatrix in this case had made a grant to A, a male of the entire properties of hers as malik with "powers of sale gift &c.," subject to a condition *viz.*, that of a village, a certain named lady shall be malik. The grant in her favour was not accompanied by any statement as to her powers. From this the first court inferred that her "maliki" was of a more qualified kind than that of A. Their Lordships held that this inference was inadmissible.

Param Hans *v.* Randhir Singh, I. L. R. 38 A. 461.

The definition of an attestation approved by their Lordships of the Privy Council in *Shamu Patter* v. *Abdul Kadir* [1] is that given in *Burdett* v. *Spillsbury* [2] "the party who sees the will

1. (1912) I. L. R. 35 M. 607. 2. (1843) 10 Cl. & Fin. 340.

executed is in fact a witness to it; if he subscribes as a witness, then he is an attesting witness." A party who does not subscribe at all cannot, therefore, be an attesting witness; what amounts to subscribing is another question, whether it should be the mark or signature of the party himself or whether the same by somebody else under his directions would suffice. It is also quite another question whether the party should subscribe himself as witness. On the authorities evidence *aliunde* would seem to be admissible to show that the party subscribing signed *animo attestandi*.

Goswami Sri Raman v. Lalji Hari Das, I. L. R. 38 A. 474.

This case raises a somewhat difficult point on the language of S. 4 of the Succession Certificate Act. That section says that no decree shall be passed against the debtor of a deceased person for payment of the debt in favour of a person claiming to be entitled to the effects of the deceased person or any part thereof except on the production by the person so claiming of (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or (ii) a certificate granted under the Act and having the debt specified therein. Now suppose the legal representative of a deceased person transfers the debt. What is the position of the transferee? Is he bound to produce a succession certificate or letters of administration in his own favour before getting a decree or is it sufficient if he produces one in favour of his assignor or is he entitled to sue without producing either. The language of Mr. Justice Walsh in this case might suggest that the last is the right view but that would be opposed to *Karuppasami* v. *Pichu* [1] and would apparently frustrate the object of the Act. We doubt if that is what is intended by his Lordship, the case itself being one in which letters of administration had already been taken out. As his Lordship points out the section has reference only to a person claiming to be entitled to the *effects* of a *deceased* person or any part of it and an assignee is not such a person. The utter absurdity of the contrary view would be made clear if we consider the case of probate of a Hindu Will in one of the Presidency Towns. After transfer, the transferor could not sue because he would have no

1. (1892) I. L. R. 15 M. 419.

title and there would also be no means of enabling the transferee to sue as there is no machinery provided for the grant of succession certificate in the Presidency Towns. This *impasse* could be avoided by reading the section as only requiring the title of the person claiming the estate of the deceased to be vouched by the successsion certificate or letters of administration irrespective of the person that sues. The liability of the assignee to produce such a voucher is a liability *de hors* the Act, a consequence of the rule that an assignee takes subject to all the liabilities of the assignor.

It is a more difficult question whether the conclusiveness and the indemnity afforded by S. 16 would be available in the case of transferees as well. Seeing that the indemnity is afforded not only to payments but also dealings, it does not *prima facie* seem improper to extend it to payments to transferees, provided the validity of the transfer *inter se* between the transferor and the transferee is established. The liability to account under S. 25 would also devolve on the transferee under S. 132 of the Transfer of Property Act.

Secretary of State for India v. Chellikani Rama Rao, I. L. R. 39 M. 617 (P. C.).

With this case, we shall have seen the last of the doctrine that it is open from a shorter enjoyment than is insisted upon by the statute, to infer a longer enjoyment subject to the inference being displaced by the other side. Though the case is one on Art. 149 of the Limitation Act, we do not fancy that a different rule can be laid down with regard to easements or with regard to private individuals. In all cases, the onus of establishing enjoyment for the *full* prescription period would lie on the party alleging it.

With this case, we shall also have seen the last of the attempts based upon *Rangoon Botatung Company* v. *Collector of Rangoon* [1] to cut down the right of appeal. Their Lordships are perfectly clear on the point. "When proceedings of this character reach the District Court," they say "that court is appealed

1. (1912) I. L. R. 40 C. 21.

to as one of the ordinary courts of the country with regard to whose procedure orders and decree, the ordinary rules of the Civil Procedure apply." Th.s, it may be noted, is in accordance with the view enunciated by the House of Lords in *National Telephone Company* v. *Post Master General* [1].

The moot point of jurisprudence decided in this case which must give it more than Indian importance is that the Crown has property in the sea bed within the three-mile limit.

Janaki Ammal *v.* **Narayanasami Aiyar**, I. L. R. 39 M. 634 (P. C.)

Although it was well understood that bare declarations should not ordinarily be given in favour of a reversioner that he is such, it was thought that this was not an inflexible rule; their Lordships apparently think otherwise.

Satyabhama *v.* **Kesavacharya**, I. L. R. 39 M. 658.

In this case, their Lordships enforce in favour of a fallen Brahmin widow the humane provisions of the Hindu Law allowing starvation allowance even to fallen women if they repent. It was possible to have held them to be mere moral injunctions, or to have treated the widow's case as an exception. But on the whole we think that their Lordships chose the better part in treating the injunction as legal and enforceable. It is curious to note that the practice referred to in the Mitakshara of providing a residence is still prevalent among the Nambudiris.

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1. (1913) A. C. 546.

NOTES OF INDIAN CASES.

Venkayamma Rao *v.* Appa Rao : I. L. R. 29 M. 509, P. C.

This, no less than the previous judgment of Lord Shaw in *Mahomed Mussa* v. *Aghore Kumar Ganguly* [1] may be counted on to confuse for a considerable time to come the profession and the judiciary in this country, a result more or less to be expected from the application of the terms of an alien system of jurisprudence to the Statute law of this country. Terms like proposal, acceptance, contract and specific performance are freely used in this case to denote the nature of the transaction and the remedy thereon. Nevertheless, it will be found that the action was not framed as for specific performance but was one merely for declaration of title and possession. Nor is the basis for decree in favour of the plaintiff precisely indicated, whether it is based on the doctrine of part performance or whether their Lordships use the term contract in the sense of executed contract or conveyance (a course justifiable in Scots jurisprudence) or whether their Lordships regard the suit as substantially one for specific performance. However, rei interventus or actings upon it will be found, are used only for presuming a completed engagement and as such, it cannot be said that relief was given to the plaintiff with reference to the doctrine of part performance nor was reference to such a doctrine necessary in the circumstances of the case, the suit being in time, viewed even as a suit for specific performance. The only difficulty in accepting the view that the suit was treated by their Lordships as one for specific performance is that presented by the frame of the decree. Even viewing the transaction as a conveyance in 1893, it was not, as pointed out by their Lordships a transaction for which the Indian Law required writing. A transfer for consideration, not being a sale, does not require writing. Such writing as there was, contained but a bare proposal and did not require registration. Thus the case, properly understood, it will be found does not afford foundation for the reversal of the previously accepted opinions of this court *e. g.*, in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [2].

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1. (1914) I. L. R. 42 C. 801. 2. (1904) I. L. R. 29 M. 336.

Re Abdur-Desikachari : I. L. R. 39 M. 539.

This case is *ad idem* with 27 M. 510 but the reasoning seems to go further than is warranted by that case. The reasoning based on the circumstance that Art. 15 falls within the part dealing with civil jurisdiction would affect right of appeal in sanction matters as well as in the case of proceedings under S. 145. Right of appeal in the former case is recognised by a Bench of three Judges in *Chakrapani Ayyangar* v. *King Emperor* [1]; in the latter by a Full Bench in *Rajah of Kalahasti* v. *Narasimha Nayanivaru* [2]. The judgments in these two cases make it clear that neither the circumstance that the Court that passes the order is a criminal Court, nor the circumstance that the object of the proceedings is prevention of a criminal offence is sufficient to make the order an order in a *criminal trial*. The true test seems to be that deducible from the collocation of the two words "sentence or order;" it must either be a sentence or something *ejusdem generis* with a sentence. Applying this test, an order under S. 488 would come within the exception; for whether the direction to pay is a sentence or not there is the alternative penalty of an imprisonment in the case which would be in the nature of a sentence. In the case of security proceedings, we have the nearest approach to a sentence. We doubt if the same can be said of proceedings under S. 133. These proceedings would seem more appropriately to go with proceedings under S. 145 than with proceedings under the security chapter unless the circumstance that disobedience of the order promulgated is expressly made an offence should be considered to make a difference. In *Subbaya* v. *Ramaya* [3], the view is taken that no appeal lies against such an order.

Subrahmania Pillai *v.* Kumaravelu Ambalan : 39 M. 541.

This point is now covered by a Full Bench of this court. (see C. M. A. 51 and 93 1915.)

1. (1902) 12 M. L. J. 408. 2. (1907) 17 M. L. J. 158.
3. (1915) I. L. R. 39 M. 537.

Husain v. Karim: I. L. R. 39 M. 545.

Subject to one qualification which we would suggest this case contains, we think, an accurate and comprehensive statement of the rules of limitation applicable to the case of mortgage decrees passed under the Transfer of Property Act. The conclusions deducible from the case law are thus summarised (i) The preliminary decree passed under S. 88 of the Transfer of Property Act is executable. (ii) In order to obtain the order absolute under S. 89, steps have to be taken in execution. (iii) To such applications Art. 182 or 183 would apply according as the decree happens to be of a mofussil court or of the original side of the High Court. (iv) There is a fresh starting point given to the decree holder after the preliminary decree ripens into a final decree. (v) It would follow from the above that a decree-holder will have 12 years under S. 48 of the Code of C, P. C. to perfect the preliminary decree and another 12 years under the same section if he gets an order absolute within the first 12 years. The emendation required is that suggested by *Rangiah Goundan & Co. v. Nanjapparao* [1], *viz.*, that art. 181 (178) must apply to the first application to make the order absolute by reason of the inapplicability of the third column of art. 182 to such a case.

Moolchand v. Alwar Chetty: I. L. R. 39 M. 548.

As observed by their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* [1] "after the passing of a decree, the matter passes from the domain of contract to that of judgment" and the rights of the promisee "should thenceforth depend not on the contents of his bond but on the directions in the decree", but the decree carries out only what the parties undertook under the contract, and it seems to be a fair presumption to make that where the promise is a joint and several promise, the decree passed upon such a promise similarly imposes a joint and several liability. Joint and several decrees are contemplated by the code, see O. 21, R. 18.

1. (1908) I. L. R. 26 M. 780. 2. (1906) I. L. R. 34. C. 150.

Sri Jagannada Raju *v.* **Sri Rajah Prasad Rao**: I. L. R. 39 M. 554.

We are not certain that in deciding that the contract is void, their Lordships are not adding a new head of public policy, a course disapproved in *Janson v. Driefontein Consolidated Mines* [1].

A contract is not a conveyance and is attended with several obstacles to its fulfilment and it is hard to infer out of the statutory bar to transfers *in praesenti* a prohibition of agreements to transfers *in futuro* when the transfer becomes permissible in law. The transfer of a *spes successionis* is only void and not illegal. Personal estoppels against reversioners recognised in numerous cases in this Court as well as the Privy Council would seem to point to the contrary conclusion.

[*End of Vol. XXXI.*]

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1. (1902) A. C. 484.

NOTES OF RECENT CASES.

Seshagiri Aiyar, J.
Phillips, J. — L. P. A. No. 316 of 1914.
1916, July 11.

Contract—Offer and acceptance—Counter proposal—Silence, if amounts to acceptance.

A ordered goods from B and directed that they should be immediately despatched. Ten days after the receipt of the order B wrote back saying that he would send the goods in ten or fifteen days thereafter. There was no reply to this letter from A.

Held, that there was no completed contract between the parties, that B's letter contained a counter proposal which was not accepted by A, and that in the circumstances of the case A's silence did not amount to an acceptance of B's offer.

T. Prakasam for Appellant.

P. V. Parameswara Iyer for Respondent.

The Offg. Chief Justice
Krishnan, J. — A. S. No. 110 of 1915.
1916, July 11.

Evidence Act, S. 41—Judgment in rem*—Grant of letters of administration with will annexed—Bar to subsequent suit impugning will.*

Where letters of administration with the will annexed have been granted, a subsequent suit impugning the validity of the will is barred by reason of S. 41 of the Evidence Act.

G. Venkatramiah for Appellant.

B. Narasimha Rao and *P. Somasundram* for Respondent.

The Offg. Chief Justice
Seshagiri Aiyar and
Phillips, JJ. — L. P. A. No. 290 of 1914.
1916, July 17.

Hindu Law—Joint Family—Alienation of Specific property by a member—Alienee not entitled to joint possession.

Where a stranger purchases a portion of joint family property from one of the members of the family, he cannot ask for joint possession along with the other members but can only sue for partition.

T. Prakasam for Appellant.

P. Nagabhushanam for Respondent.

Spencer and Krishnan, JJ. *1916, July 18.* C. M. S. A. No. 22 of 1915.

Limitation Act, 1908, Art. 182, (5)—Application in accordance with law—Relief which the Court is incompetent to grant, application for—Whether saves time for a subsequent application for execution.

Where a decree holder in his execution petition asked for the arrest of the judgment debtor's legal representatives, while his only right was to proceed against the assets of the deceased judgment-debtor in the hands of the legal reprentatives and the execution application was dismissed and within 3 years of that application he again applied to execute the decree against the assets of the judgment-debtor, *Held* that the latter application was not barred by limitation; and the former application though it prayed for a relief which the Court could not grant was an application "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act.

(1914), M. W. N., p. 157, followed.

Mir Sultan Mohideen for Appellant.

V. Ramesam for the Respondent.

Spencer, J. *Krishnan, J.* *1916, July 19.* C. M. S. A. No. 39 of 1915.

Limitation Act, 1908, Art. 182 (5)—Application in accordance with law—Application not giving details of, prior execution petitions—Returned for amendment—Necessary amendments not made—Whether one in accordance with law—Civil Procedure Code, 1908. O. 21 R. 17 (2)—Whether has changed the law.

Where an execution petition was presented in 1911 in which the date of a former petition was not given and another petition and its result were not mentioned at all and the petition (of 1911) was returned for amendment in the above particulars, but was not re-presented after making the amendments and there was no prejudice to the judgment-debtor by reason of the inaccuracies in the petition, *Held* that such a petition is one in accordance with law and will save time for a subsequent application for execution.

16 M., p. 142, followed.

O. 21 R. 17 (2) of the Civil Procedure Code of 1908 has not made any change in the meaning to be given to the word "in accordance with law" in Art. 182 (5) of the Limitation Act.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Aiyar* for the Appellant.

V. Narasimha Aiyangar for the Respondent.

NOTES OF RECENT CASES.

Ayling, J.
Srinivasa Aiyangar, J.
1916, July 26.

C. M. P. No. 1936 of 1916.

Civil Procedure Code, O. 45 r. 7—Deposit of Security after six months of the decree or six weeks of the certificate—Power of Court to order—Cogent reasons—Poverty and inability to find funds, whether sufficient reason.

The Court has jurisdiction to extend the time for furnishing security under O. 45 r. 7 for cogent reasons; and there are no limitations for exercising their discretion to excuse the delay. Poverty and inability to find funds within the specified time may be a ground to excuse the delay.

T. R. Ramachandra Aiyar for the Petitioners.

C. A. Seshagiri Sastri for *I. M. Krishnaswami Aiyar* for the Respondents.

[Ed.—Their Lordships declined to follow 14 Mad., p. 391, and 14 Mad., p. 392, contra.]

Ayling and
Srinivasa Iyengar, JJ.
1916, July 27.

A. S. Nos. 170, 171 and 231 of 1914.

Mahomedan Law—Waqf—Dedication—Execution of registered waqfnamah—Fraud of creditor—Transfer voidable—Subsequent conduct of dedicator, if relevant.

Where a Mahomedan in heavily involved circumstances executes a registered deed of waqf of all his properties and himself continues in possession, creditors can impeach the transfer as being colorable and intended to defraud them. Evidence of the subsequent conduct of the dedicator and his representatives is relevant to prove the colorable nature of the dedication.

C. Madhavan Nair for Appellant.

C. V. Ananthakrishna Aiyar and *A. S. Venku Iyer* for Respondents.

Phillips, J.
1916, July 28.

Crl. R. C. No. 104 of 1916.

Criminal Procedure Code, Ss. 4 (h) and 203—Dismissal of complaint, if a bar to re-hearing it—Letter to the District Magistrate to take action, if a complaint.

Where a complaint under S. 203, Criminal Procedure Code is dismissed and the order of dismissal is not set aside, it is still competent to the Magistrate to re-hear it.

A letter sent by a District Munsif to the District Magistrate as head of the Police of the District, to take proceedings against a person under Ss. 193, 467 and 471, I. P. C., is a complaint.

26 A. 514 followed.

K. V. Krishnaswami Aiyar for *T. M. Krishnaswami Aiyar* for Petitioner.

The Public Prosecutor for the Crown.

Oldfield and Sadasiva Aiyar, JJ.
1916, August 4.

Referred Case No. 1 of 1916.

Jurisdiction—Small Cause Court—Suit for contribution from ex-partner in respect of sums paid for debts of dissolved partnership.

A suit by a partner, who pays the debts of a dissolved partnership, for contribution from his ex-partners is cognisable by a Small Cause Court.

A. V. Visvanatha Sastri for Petitioner.

G. S. Venkatarama Aiyar for Respondent.

Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Phillips, JJ.
1916, August 7.

Full Bench.
C. M. S. A. No. 105 of 1914.

Civil Procedure Code, S. 48 (a) and (b)—Combined decree in mortgage suit—Right to proceed against other properties after exhausting the hypotheca—Execution of decree—Limitation.

Per *Abdur Rahim, O.C.J.* and *Seshagiri Iyer, J.* (*Phillips, J.* dissenting.) Where a mortgage decree for sale also includes a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale proceeds of the mortgaged property are found insufficient to satisfy the entire decree amount, the period of 12 years limited by S. 48 of the C. P. Code, for the execution of the decree against the other properties of the mortgagor begins to run not from the date of the decree but only from the date when the mortgaged properties are sold and the sale proceeds found insufficient to satisfy the decree.

A. V. Visvanatha Sastri for Appellant.

S. Muthiah Mudaliar for Respondent.

The Offg. Chief Justice, Seshagiri Aiyar and Phillips, JJ.
1916, August 7.

L. P. A. 329 of 1914.

Transfer of Property Act, 83, 84—Deposit in Court—Disputes among heirs of the mortgagee—Subsequent withdrawal by mortgagor—Cessation of interest.

A mortgagor having deposited the mortgage amount in Court under S. 83 of the Transfer of Property Act allowed the same to remain there for a period of one year but subsequently withdrew it as the heirs of the original mortgagee could not draw the amount owing to disputes among themselves as to who was entitled to the amount. *Held* that interest did not cease to run from the date of the deposit.

Per *The Offg. Chief Justice and Seshagiri Aiyar, J.* (*Phillips, J.* contra). The mortgagor should have continued the deposit in Court to enable the mortgagee to take the amount from Court.

35 Mad., p. 44 followed.

Per *Phillips, J.*—As the heirs of the mortgagee would not draw the amount till they had settled the disputes among themselves, the mortgagor by withdrawing the amount before they settled their disputes, had not done everything to enable the mortgagee to take the amount from Court.

The view, that even after a refusal by the mortgagee to take the amount from Court the deposit must be continued, to stop interest from running as laid down, 35 Madras 44 *not approved.*

K. R. Rengasawmi Aiyangar for the Appellant.

B. Sitaram Rao for *T. R. Venkatrama Sastri* for the Respondents.

The Offg. Chief Justice, Seshagiri Aiyar, and Phillips, JJ.
1916, August 7.

Full Bench.

S. A. No. 2177 of 1914.

Evidence Act, S. 116—Estoppel between landlord and tenant—Tenant not let into possession, but already in possession executing lease deed—Whether estopped from denying title of landlord.

Where a tenant already in possession executed a lease deed to a person thereby acknowledging him to be the landlord and when on the expiry of the term of the lease, the landlord brought

a suit in ejectment against the tenant and the tenant denied the title of the landlord.

Held, per Seshagiri Aiyar and Phillips, JJ.—(The Offg. Chief Justice dissenting) that in the absence of proof, that the lease deed was executed under circumstances of fraud, misrepresentation or mistake entitling a party to a contract to set it aside, the tenant is estopped from denying the landlord's title.

Per The Offg. Chief Justice.—S. 116 of the Evidence Act is exhaustive of the law of estoppel and is the same as the English Law on the point. A tenant not let into possession by the landlord is not estopped from denying his landlord's title. S. 116 of the Evidence Act only deals with cases where the tenant has been let into possession by the landlord.

T. M. Krishnaswami Aiyar for the Appellant.

V. C. Seshachariar for the Respondent.

Abdur Rahim, O. C. J.
and Seshagiri Aiyar, J.
1906, August 7.

O. S. A. 87 of 1915.

Presidency Towns Insolvency Act, Ss. 7 and 36—High Court —Insolvency Jurisdiction—Claims outside the ordinary original Civil Jurisdiction—Power of Court—Letters Patent, cl. 12.

Under S. 7 of the Presidency Town Insolvency Act, the High Court in the exercise of its insolvency jurisdiction has the power to try claims against third parties who are alleged to be in possession of the property of the insolvent or to be indebted to him and the Court can exercise this power though the claim be one which it could not entertain under cl. 12 of the Letters Patent, in the exercise of its ordinary original Civil Jurisdiction.

M. D. Devadoss for Appellant.

M. A. Tirunaranachari for Respondent.

Abdur Rahim, Offg. C.J.
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

Full Bench.

L. P. A. 205 of 1914.

Shrotriem—Grant of—Enfranchisement of Inam—Right of Government to minerals and quarries.

A whole village was granted as Shrotriem to the ancestors of the plaintiff. At the time of the enfranchisement, the Inam Commissioner issued a title-deed to the then Shrotriemdar recognising the Shrotriem as the absolute property of the Shrotriemdar subject only to the payment of a fixed quit-rent. *Held*, that the Government had parted with the entire free-hold interest in the land in favour of the shrotriemdar, including the rocks and minerals and that the Government had no right to levy seignorage on stones quarried by the shrotriemdar.

The Ag. Government Pleader (V. Ramesan) for Appellant

T. R. Venkatarama Sastri for Repondent.

Abdur Rahim, Offg. C. J.
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

Full Bench.
L. P. A. Nos. 39 of 1915.

Mortgage—Contribution—Purchase of some items of mortgaged property freed from the mortgage, by the mortgagee—Subsequent transferee of remaining items from the mortgagor—Liability to pay the entire mortgage amount—No right to contribution.

Where a mortgagee purchased some items of the mortgaged property freed from the liability to pay the mortgage debt and on the understanding that the entire mortgage debt was to be paid out of the remaining items and the mortgagor subsequently sells the remaining items to a third person, *held* that the mortgagee could realise the mortgage debt entirely out of the properties in the hands of the subsequent purchaser and that the latter had no right to contribution from the mortgagee-purchaser.

C. Padmanabha Aiyangar for Appellant.

K. R. Rengaswami Aiyangar for Respondent.

Abdur Rahim, Offg. C. J.
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

L. P. A. Nos. 270 and 271 of 1914.

Limitation Act, Arts. 11 and 29—Suit to establish right to moveables wrongfully attached and sold in execution and for heir value—Limitation—Starting point.

Where a person whose objection to the attachment of certain moveables in execution of a decree was dismissed, brings a suit for a declaration of his right to, and for the recovery of the value of the moveables alleged to have been wrongfully sold in execution, *held* that the suit is governed by Art. 11 of the Limitation Act and that limitation begins to run from the date of the adverse order in the claim proceedings and not from the date of seizure under Art. 29 of the Limitation Act.

P. Somasundaram for Appellant.

T. Prakasam for Respondent.

Ayling and Srinivasa Aiyangar, JJ.
1916, August 8.
A. S. No. 219 of 1913.

Civil Procedure Code, S. 10—Two Suits involving common issues between same parties—Procedure—Stay of Suit—Dismissal of Suit, improper.

Under S. 10 of the new Civil Procedure Code, where two suits involving common issues as between the same parties are instituted, the Court has no power to dismiss the subsequent suit. The proper procedure is to stay the trial of the subsequent suit pending the decision in the former.

27 M. L J. 405, Referred to.

A. V. Visvanatha Sastri for Appellant.

A. Krishnaswami Iyer and *M. Subbaraya Aiyar* for Respondents.

Oldfield and Sadasiva Aiyar, JJ.
1916, August 9.
L. P. A. Nos. 10, 61 and 62 of 1916.

Civil Procedure Code, O. 22 R. 5—Legal representative, Determination of, in suit or appeal—Not res judicata *in subsequent proceedings.*

Where a person claims to be the legal representative of a deceased party to a suit or appeal but another is brought on record as the legal representative under O. 22 R. 5, Civil Procedure Code, decision does not bar a fresh suit by the defeated claimant to establish his character as legal representative.

S. Muthiah Mudaliar for Appellant.

T. R. Venkatarama Sastri for Respondent.

NOTES OF RECENT CASES.

Oldfield and Sadasiva Aiyar, JJ. 1916, August 4. — C. M. A. No. 247 of 1915.

Provincial Insolvency Act, S. 36—Proceedings under—Court directing Official Receiver to take evidence and submit report as to validity of a mortgage by insolvent—Delegation of functions, irregular.

A Court exercising insolvency jurisdiction under S. 36 of Act III of 1907 has no power to direct the Official Receiver to take evidence and submit a report as to whether a mortgage executed by an insolvent was *bona fide* or not. The Court must itself take the evidence and adjudicate upon the claim.

K. S. Ganesa Aiyar for Appellant.

S. T. Srinivasagopalachari for Respondent.

Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Phillips, JJ. 1916, August 7. — S. A. No. 945 of 1914.

Madras Irrigation Cess Act (VII of 1865) S. 1 (b)—Irrigation by percolation—Sub-soil water absorbed by trees—Certificate of Collector—Levy of cess.

It is not obligatory on the Collector personally to certify under S. 1 (*b*) of Act VII of 1865 that the irrigation is beneficial. The enquiry by the Collector under the section is not a judicial one. 'Irrigation by percolation' within S. 1 (*b*) of the Act covers cases where subsoil water is absorbed by the roots of trees.

V. Ramesam (Government Pleader) for Appellant.

T. R. Venkatarama Sastri for Respondents.

Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ. 1916, August 7. — L. P. A. No. 102 of 1915.

Equitable Assignment — Debtor and creditor —Letter by debtor authorising creditor to collect decree debt due to the former —Power of attorney to creditor to execute decree—Rights of creditor.

Where a debtor wrote a letter to the creditor directing him to collect a decree debt due to the former and appropriate the same in satisfaction of the debt due to the creditor and also executed a power of attorney authorising the creditor to execute the decree standing in the name of the debtor, *held*, that the letter and the power of attorney together constituted an equitable assignment of the decree debt in favour of the creditor. The mode or form of the assignment is immaterial provided the intention of the parties is clear.

L. A. Govindaraghava Aiyar for Appellant.

T. Narasimha Aiyangar for Respondent.

Oldfield and Sadasiva Aiyar, JJ.
1916, August 8.

S. A. No. 2087 of 1913.

Religious Endowment—Tarwad Temple — Right of junior members to sue for removal of Karnavan—Sanction under S. 92, unnecessary—Compromise—Alienation of trust property—Duty of Court—Hindu widow—Power to compromise, limits of.

Where a temple belongs to a tarwad, it is open to the junior members of the tarwad to sue for the removal of the *Karnavan* from the management of the Devaswom, for good cause shown, without the sanction prescribed by S. 92, Civil Procedure Code, or S. 18 of the Religious Endowments, Act.

It is open to the parties to compromise a litigation concerning a trust but where the compromise has the effect of an alienation of the properties belonging to the trust, Courts will scrutinize it with great care before recognising its validity as against the trust.

The powers of a Hindu widow to compromise a litigation concerning her husband's estate so as to bind the actual or contingent reversioners have been too narrowly laid down in the decisions.

Bhogaraju Venkatrama Jogiraju v. *Addepalli Seshayya* [1], referred to.

T. R. Ramachandra Aiyar for Appellants.

C. V. Ananthakrishna Aiyar for Respondents.

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1. (1911) I. L. R. 35 M. 560

Abdur Rahim, O. C. J., and Krishnan, J. 1916, August 10. A. S. No. 235 of 1913.

Abatement—Malicious prosecution—Suit for damages—Death of plaintiff during pendency of appeal.

Where during the pendency of an appeal in a suit for damages for malicious prosecution, the plaintiff-appellant dies, *held*, that the cause of action does not survive to his legal representatives and that the appeal abates.

Krishna Behari Sen v. *The Corporation of Calcutta* [1] followed.

L. A. Govindaraghava Aiyar and *L. Venkataraghava Aiyar* for Appellants.

S. Ranganadha Aiyar for Respondents.

Oldfield and Sadasiva Aiyar, JJ. 1916, August 11. S. A. No. 2382 of 1913.

Damages—Contract of indemnity—Breach—Cause of action, when arises.

The defendant agreed to indemnify the plaintiff in respect of any loss that the property of the latter might sustain by reason of the defendant's default in the carrying on of a *Kuri* started by the plaintiff's husband. The property of the plaintiff was sold in Court auction for the satisfaction of claims under the Kuri arrangement. Plaintiff who in spite of the Court sale continued in possession of the properties, sued the defendant for damages. The Lower Courts dismissed the suit as premature. *Held*, that there was a loss of title sustained by the plaintiff, which entitled her to sue for damages.

K. Ramanath Shenai for Appellant.

B. Sitarama Row for Respondent.

Spencer and Krishnan, JJ. 1916, August 11. S. A. No. 2281 of 1914.

Madras Estates Land Act, S. 12—Trees in holding—Cutting and carrying away by landlord—Tenant's suit for damages—Civil Court—Jurisdiction—Nature of suit—Second Appeal, if

1. (1904) I. L. R. 31 C. 406.

lies—Plaint returned for representation to proper Court—Effect —Estates Land Act, S. 213—Scope of.

A suit by a tenant against his landlord for damages for trees in his holding, cut and carried away by the landlord contrary to the provisions of S. 12 of the Madras Estates Land Act is cognisable by the Civil Courts. Such a suit is a suit of a small cause nature and no second appeal lies against the decree therein. The fact that the plaint in such a suit was returned under S. 23 of the Provincial Small Cause Courts Act for presentation to the proper Court does not affect the matter.

Scope of S. 213 of the Madras Estates Land Act explained.

P. R. Ganapathi Aiyar for Appellant.

T. S. Narayana Sastri for Respondent.

Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ. 1916, August 15.

S. A. No. 2062 of 1914.

Transfer of Property Act, S. 55 (4)—Vendor's lien for unpaid purchase money—Contract to the contrary—Direction to vendee to pay off creditor of vendor—Default—Lien of vendor for unpaid purchase money—No waiver.

Where a purchaser of immoveable property covenants, in consideration of the transfer of such property to him, to discharge certain liabilities of the seller, *held* that upon breach of such a covenant the seller is entitled to a charge on the property in the hands of the purchaser under S. 55 (4) (b) of the T. P. Act.

The mere direction to the vendee to pay off a creditor of the vendor, does not negative the statutory charge for the unpaid purchase-money. *Abdulla Beari* v. *Mammali Beari,* [1] overruled.

A. V. Visvanatha Sastri for Appellant.

N. Rajagopala Chari for Respondent.

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1. (1915) I. L. R. 38 Mad 446.

NOTES OF RECENT CASES.

Abdur Rahim, Offg. C. J. and Seshagiri Aiyar and Phillips, JJ. 1916, August 15. — C. M. A. No. 51 and 93 of 1915.

Civil Procedure Code, O. 21 R. 2 (3)—Decree—Agreement prior to decree providing for its satisfaction in a particular manner or postponing execution, if can be pleaded in bar of execution.

Per Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J. Phillips, J. dissenting.

During the pendency of a suit, the parties entered into an agreement that the defendant should submit to a decree in the suit and that the plaintiff should receive within a fixed date a smaller sum in full discharge of the decree and the plaintiff should not, before that date execute or transfer the decree that may be passed. A decree was accordingly passed in the suit against the defendant. *Held* that it was open to the defendant to rely on the aforesaid agreement as a bar to execution of the decree by the plaintiff decree-holder.

K. V. Krishnaswami Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Phillips, JJ. 1916, August 15. — S. A. No. 801 and 688 of 1914.

Civil Procedure Code, S. 92 (2), O. 1 R. 8—Suit by two worshippers of Hindu Temple on behalf of general body of worshippers, to set aside alienation of temple property by members of the Temple Committee—Suit without sanction of Advocate-General nor with sanction under S. 18 of the Religious Endowments Act, if maintainable.

Two worshippers of a Hindu Temple acting on behalf of themselves and the other worshippers, instituted a suit to set aside a permanent lease of the money offerings made by the worshippers, granted by the members of the Devasthanam Committee in favour of the Archakas with a reservation of Rs. 300 a year to the temple. Neither the sanction of the Advocate-General

nor the leave prescribed by S. 18 of the Religious Endowments Act was obtained for the suit.

Held, that the suit was maintainable as laid.

C. S. Venkatachariar for Appellant.

K. Bhashyam Aiyangar for Respondent.

Spencer and Krishnan, JJ.
1916, August 15.
S. A. No. 2363 of 1914.

Onus of Proof—Hindu Law—Reversion—Suit for possession on death of widow—Plea that property was widow's, having been purchased by her—Onus of Proof—Proof that widow has no funds while last owner had ample funds—Effect.

Where in a suit brought by a reversionary heir after the death of a childless Hindu widow for the recovery of property alleged to belong to her husband, the defendants raised the plea that it belonged to the widow, having been purchased by her with her own funds, and not to her husband, *held* that the onus of proving that the property formed part of the deceased's estate lay on the plaintiff, although it was proved that the widow had no funds wherewith to make the purchase and that the deceased died possessed of considerable property.

26 C. 871 P. C. followed.

T. V. Muthukrishna Aiyar for Appellants.

Hon. Mr. T. Rangachariar and *K. Raja Aiyar* for Respondent.

Seshagiri Aiyar, J.
1916, August 17.
Cri. Revn. Case No. 291 of 1916.

Criminal Procedure Code, S. 197—Public servant—Offence by—Sanction when necessary—Talayari of village, if a public servant within the section.

Sanction under S. 197, Cr. P. Code is required only in cases where the public servant who is sought to be prosecuted professes to act in the exercise of his duties as such public servant and while so acting exceeds his authority or commit an offence. The section is not applicable to a case where the public servant does an act independently of the discharge of his official duties.

A *Talayari* of a village is not a public servant of the category specified in S. 197, Cr. P. Code.

C. Veeraraghava Iyer for accused.

The Public Prosecutor for the Crown.

Oldfield, Sadaśiva Aiyar and Seshagiri Aiyar, JJ. 1916, August 17. — C. M. A. No. 333 of 1914.

Will—Revocation—Later will—Codicil—Intention to revoke —Extraneous evidence—Admissibility.

In the absence of an express reservation, a later will revokes an earlier one. If, however the later instrument is only a codicil, the presumption is that the earlier will should be operative, unless the codicil contains clear expressions to the contrary. Where it is doubtful whether a later will was meant to revoke an earlier one, extrinsic evidence of the intention of the testator is admissible.

T. R. Ramachandra Aiyar and *C. P. Ramaswami Aiyar* for Appellant.

J. L. Rozario for Respondents.

Oldfield and Krishnan, JJ. 1916, August 23. — Ref. Case No. 3 of 1916.

Paper Currency Act, S. 26 —Promissory Note—Payable to bearer or order on demand—Suit on original loan if lies.

A promissory note, payable on demand to bearer or order, contravenes S. 26 of the Paper Currency Act and cannot be sued on. It is, however, open to the Court to give a decree in respect of the debt, covered by the note, on proof of an independent agreement to repay the same.

The Hon. The Ag. Advocate-General (S. Srinivasa Aiyangar) C. S. Venkatachari and *K. S. Ganapathi Iyer* for petitioner.

B. Sitarama Row (Amicus Curiae) for Respondent.

Seshagiri Aiyar and Napier, JJ. 1916, August 23. — S. A. No. 2242 of 1914.

Malicious prosecution—Damages—Suit for—Cattle Trespass Act, S. 20—Prosecution for illegal impounding of cattle, gives rise to a cause of action.

To sustain an action for malicious prosecution it is not necessary that criminal proceedings, should have been launched against the plaintiff. It is enough if proceedings in the nature of criminal proceedings, *e. g.* bankruptcy, winding up etc. were started against him.

Where, however, the plaintiff impounded defendant's cattle and the latter preferred a complaint against the former under S. 20 of the Cattle Trespass Act. *Held* that there was no cause of action to the plaintiff to institute a suit for damages for malicious prosecution. The gist of the action is not the prosecution but the aspersion it casts on the reputation and character of the person prosecuted, and there being no moral turpitude or injury to reputation by reason of a charge of illegal seizure of cattle being preferred against the plaintiff, he had no right to sue.

K. R. Rangaswami Aiyangar for *A. K. Madhava Rao* for Appellant.

T. Ramachandra Rao for Respondent.

Abdur Rahim, Offg. C. J. and Phillips, J. 1916 August 29. — O. S. A. No. 79 of 1915.

Hindu Law—Joint Family—Partnership—Starting of new business by adult member—Liability of minor members—Nattukottai Chetties.

Per Abdur Rahim, Offg. C. J :—Where the adult member of a joint Hindu family started a new business, without detriment to the ancestral estate and the minor members lived with him and were also being maintained by him, *held*, that there was no presumption that the business was a joint family business and that the minors were not partners with the adult member in the business so as to make themselves personally liable on attaining majority for the debts of the business.

Per Phillips, J.—Where the head of a Nattukottai Chetty family possessed of a nucleus of ancestral property starts a business and the other members who are minors live with him and actively assist him in the business without receiving any salary for their labours, the inference is that the business was a joint-family business and that the minors were admitted to the benefits of the partnership so as to be liable, personally, on attaining majority, for the debts of the business.

K. Ramanath Shenai for Appellant.

Dr. Pandalai for Respondent.

NOTES OF RECENT CASES.

Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J. 1916, September 4. O. S. A. No. 85 of 1915.

Criminal Procedure Code, S. 195—Sanction—Omission to include material document in affidavit—Perjury—Sanction, bad.

Where a party omitted to include a material document in the affidavit of documents filed by him in an original suit, *held*, that the omission by itself did not warrant the grant of sanction for his prosecution.

V. C. Seshachariar for Appellant.

D. Chamier for Respondent.

Oldfield and Krishnan, JJ. 1916, September 5. C. M. A. Nos. 106 and 42 of 1915.

Provincial Insolvency Act (III of 1907) Ss. 36 and 46 (2)—Reference by Official Receiver to District Judge for annulling sale by insolvent—Decision of District Judge—Right of creditor, not a party to proceedings before District Judge, to appeal—"Aggrieved party"—Official Receiver, position of—Proceedings under S. 36—Duty of Court to take evidence.

Where the Official Receiver made a reference to the District Judge under S. 36 of the Provincial Insolvency Act for annulling a sale-deed executed by the insolvent in favour of one of his creditors within 2 years of the insolvency and the District Judge set aside the sale but gave the creditor a charge for the consideration mentioned in the sale-deed and another of the creditors who was a party to the proceedings before the Receiver but not before the District Judge, appealed from the order of the latter, *Held*, that he was a "person aggrieved" within S. 46 (2) of the Provincial Insolvency Act, so as to entitle him to prefer an appeal.

The Official Receiver represents the whole body of creditors and it is his duty to appeal against any order which he thinks is prejudicial to the interests of the creditors. The fact that a transaction

is said to be "void as against the Official Receiver" does not mean that he alone is the person aggrieved.

A District Judge exercising jurisdiction under S. 36 of the Provincial Insolvency Act will not be justified in treating as legal evidence, the depositions of witnesses examined by the Official Receiver, though such depositions were taken on oath, such depositions cannot be treated either as affidavits or as evidence taken on commission.

C. M. A. No. 247 of 1915 followed.

R. Gopalaswami Aiyangar for *T. Rangacharir* for Appellant in C. M. A. 106.

S. T. Srinivasagopalachari and *N. S. Rangaswami Aiyangar* for Respondent.

K. V. Krishnaswami Aiyar for Appellant in C. M. A. 42.

S. T. Srinivasagopalachariar for the Respondent.

Sadasiva Aiyar and Napier, JJ.
1916, September 5.

S. A. No. 1660 of 1913.

Provincial Small Cause Courts Act, Sch. ii, Art. 13—Thunduvaram—Suit to recover—Second Appeal—C. P. Code, S. 102.

A suit for recovery of Thunduvaram is exempted from the cognizance of a Small Cause Court by Art. 13 of Sch. ii of the Prov. Sm. C. C. Act. Consequently S. 102, Civil Procedure Code, is no bar to a second appeal.

L. A. Govindaraghava Aiyar for Appellant.

T. R. Ramachandra Aiyar for Respondent.

Oldfield and Krishnan, JJ.
1916, September 6.

Crl. Rev. Case No. 205 of 1916.

Criminal Procedure Code, Ss. 145, 435 and 439—Death of petitioner during pendency of revision petition—Heir of deceased not entitled to be brought on record.

Where during the pendency of a revision petition against the order of a Magistrate under S. 145, Cr. P. Code the petitioner dies, his legal representatives have no right to be brought on record so as to enable them to continue the petition.

C. Rajagopala Aiyangar, for Petitioner.

B. Narasimha Row, for Respondent.

Spencer and Phillips, JJ.
1916, September 6.

S. A. No. 113 of 1916.

Mahomedan Law — Religious Office—Mujavar — Right of females—Custom—Validity of.

Where it was found that the duties of a Mujavar Office consisted in sweeping the mosque, spreading the mats and calling the worshippers for prayer, lighting the mosque, and reading the scriptures and it was also found that these duties had been sometimes performed by proxy, by the office holders,

Held, that females could inherit the office along with males and enjoy the emoluments, there being nothing in the usage of the institution to exclude females from the office.

3 Mad 95, 34 Cal. 118 Referred to.

T. M. Krishnaswami Aiyar for *A. Krishnaswami Aiyar* for Appellant.

S. Doraiswamy Aiyar for Respondent.

Abdur Rahim, Offg. C. J. and Phillips, J.
1916, September 7.

O. S. A. No. 25 of 1915.

Insolvency — Undischarged bankrupt—After-acquired property—Vesting of, in Official Assignee—Adverse possession—Acquisition of property by joint exertions—Rights of Assignee to such acquisition.

Where an insolvent acquires property after adjudication but before his final discharge, he does so as the agent of the Official Assignee and cannot set up adverse possession against the latter.

When an insolvent after his adjudication acquires property jointly with the other members of his family by joint exertions, it is only the share of the insolvent in such acquisition, that vests in the Official Assignee.

V. C. Seshachariar for Appellant.

M. O. Parthasarthy Aiyangar for the Official Assignee.

Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J. 1916, September, 11.

L. P. A. No. 223 of 1915.

Receiver—Appointment of, by High Court, during pendency of suit in Lower Court—Power of Lower Court to remove.

Where during the pendency of a suit for partition the Subordinate Judge made an order appointing a receiver and on appeal from that order, the High Court confirmed the appointment and subsequently the Subordinate Judge removed the receiver originally appointed for misconduct and appointed another instead, *Held*, that the Subordinate Judge had power to remove the receiver originally appointed and to appoint a new one.

T. R. Venkatarama Sastri for Appellant.

R. Sadagopachariar and Kuppusami Aiyar for Respondent.

Ayling and Srinivasa Aiyangar, JJ. 1916, September 12.

A. S. No. 212 of 1915.

Limitation Act of 1908, Art. 89—Agency—Termination—Test of—Suit against agent—Limitation—Starting point—Practice among Nattukottai Chetties—Salary chits—Significance of.

The question when an agency terminates within the meaning of Art. 89 of the Limitation Act is a question of fact to be decided on the circumstances of each case. The fact that the salary chit is for a fixed period does not necessarily indicate that the agency terminates *ipso facto* at the expiry of that period. In deciding the question the period for which the agent is entitled to his salary will be a material circumstance to be considered.

The rule laid down in *Venkatachellum Chetty* v. *Narayanan Chetty* [1] is not a rule of law applicable to all cases regardless of the facts thereof.

Practice among Nattukottai Chetties and significance of salary chits considered.

A. Krishnaswami Aiyar (*K. S. Aravamudu Aiyangar* with him) for Appellant.

T. Narasimha Aiyangar for Respondent.

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1. (1914) 28 M. L. J. 140.

Oldfield and Krishnan, JJ.
1906, September 14.

L. P. A. No. 188 of 1915.

Civil Procedure Code, S. 20 (c)—Jurisdiction—Suit on a promissory note—Place of indorsement—Cause of action.

A suit on a promissory note is maintainable in a court within the local limits of whose jurisdiction it has been endorsed in favour of the plaintiff. The indorsement constitutes a part of the cause of action, within S. 20 (c), C. P. Code.

Read v. *Brown* [1] followed.

M. Patanjali Sastri for *B. Somayya* for Appellant.

K. G. Sarangaraja Aiyangar for *V. Ramadoss* for Respondent.

Oldfield and Krishnan, JJ.
1916, September 15.

C. M. S. A. No. 108 of 1915.

Hindu Law—Widow—Decree against, for rent—Sale of property in the hands of reversioners, if allowable.

Where a decree for arrears of rent due from the estate inherited by a Hindu widow, was obtained against her and the decree was sought to be executed against the estate in the hands of the reversioners after the death of the widow, *held* that the liability of the widow was personal to her and that the decree could not be executed against the estate in the hands of reversioners.

T. R. Ramachandra Aiyar for Appellant.

T. Prakasam for Respondent.

Spencer and Phillips, JJ.
1916, September 18.

S. A. No. 2137 of 1914.

Mortgage Suit—Parties—Mortgage in favour of late Zemindar—Suit by successor without joining other heirs—Maintainability.

It is open to a Zemindar in his capacity as manager of the family to sue on a mortgage executed in favour of his deceased father, without joining his undivided brothers as parties to the suit.

Kishan Pershad v. *Har Narain Singh* [2] Referred to.

T. Eroman Unni for Appellant.

T. R. Venkatarama Sastri for Respondent.

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1. 22 Q. B. D. 128.
2. I. L. R. 33 All. 272.

Phillips, J.
1916, September 19. } C. M. P. No. 2137 to 2139 of 1916.

Land Acquisition Act I. of 1894, S. 54—Land Acquisition—Single notification—Several plots acquired—Several references made and registered as separate suits—One judgment but several awards—Legality—Appeal—Consolidation of awards.

Where several plots of land were acquired by the Government under the Land Acquisition Act under the same notification but several references were made under S. 18 of the Act and were registered as separate cases and the District Judge made a separate award in respect of each plot of land acquired though only one judgment was delivered, *held* that the Court below should have passed only one award and that the several awards passed should be deemed to be only one award and that one appeal only need be preferred to the High Court under S. 54 of the Act.

The several awards were consolidated into one.

K. S. Jayaram Aiyar, for Petitioner.

Government Pleader, for Respondent.

Seshagiri Iyer and Srinivasa Iyengar, JJ.
1916, September 20. } S. A. No. 2056 of 1915.

Madras Rent Recovery Act, Ss. 1 and 79—Landholder, meaning of—Revenue registry, transfer in, effect of—Transferee not a delegate or agent—Hindu Joint Family—Manager, right of, to tender patta and sue for rent, without joining other members.

Where a Hindu father having a permanent and self-acquired *izara right* in certain lands effected a transfer of the same in the Revenue registry in his son's name, *Held* that the transfer did not have the effect of making the son a 'landholder' within S. 1 of the Madras Rent Recovery Act and that the son was not competent to tender pattas or to sue for rents. The transfer in the Revenue registry would not confer any proprietary interest on the transferee nor would it constitute him a delegate or agent within S. 79 of the Act.

It is open to the manager of a joint Hindu family to tender a patta and institute a suit for rent without joining the other members as parties.

V. C. Seshachariar for Appellant.

K. Bhashyam for Respondent.

Ayling and Napier, JJ.
1916, September 20.

S. A. No. 1411 of 1915.

Landlord and Tenant—Buildings erected by tenant—Forfeiture—Tenant's right to compensation—Lease before the Transfer of Property Act.

Where a person holding land under a lease executed prior to the Transfer of Property Act, erects buildings on the land demised and subsequently incurs a forfeiture of the tenancy, *Held,* in a suit in ejectment by the landlord, that the tenant was not entitled to compensation but only to remove the buildings within a time to be fixed by the decree.

T. V. Muthukrishna Aiyar. for Appellants.

G. S. Ramachandra Aiyar for Respondent.

Seshagiri Aiyar and Srinivasa Aiyangar, JJ.
1916, September 20.

S. A. No. 489 of 1915.

Hindu Law—Adoption—Appointment of heir—Prostitute other than dancing girls—Estoppel, question of, not to be raised for the first time in second appeal.

Under the Hindu Law it is not permissible to a prostitute who is not a dancing girl, to adopt a girl to herself. A custom permitting such adoption is illegal and cannot be recognised by Courts.

A plea of estoppel will not be allowed to be raised for the first time in second appeal, in the absence of any averment in the pleadings.

J. L. Rozario for Appellant.

B. Sitarama Row for Respondent.

Spencer and Krishnan, JJ.
1916, September 21.

S. A. No. 1666 of 1914.

Hindu Law—Joint Family—Managing member and minor members—Sale of family property by managing member for himself and as guardian of minor members—Suit by minor to recover his share of property alienated—Limitation—Limitation Act of 1908, Arts. 44 and 144—Applicability.

Art. 44 of the Limitation Act is applicable only to a case in which a sale is made by the guardian of a minor of property in which the minor has individual rights.

29 I. C. 199 followed.

No guardian can be appointed in respect of the interest in family property of the minor member of a joint Hindu family.

Where the senior member of a joint Hindu family sells family property purporting to act in his own behalf and as guardian of the minor members, *held* a suit by one of the minor members to recover his share of the property sold was governed by article 144 and not by article 44 of the Limitation Act.

The Hon. The (Ag.) Advocate-General and *K. Balasubramania Aiyar* for Appellant.

B. Satyanarayana for *V. Ramesam* for the Respondent.

Spencer and Krishnan, JJ.
1916, September 21.

C. M. P. No. 2605 of 1916.

Appellate Side Rules—Rule 32 cl. 7—Rule inapplicable to appeals and applicable only to miscellaneous applications.

P. Somasundaram for Petitioner.

B. Narasimha Rao for Respondent.

NOTES OF RECENT CASES.

Chief Justice and Burn, J.
1916, November 8.

A. S. No. 206 and 207 of 1908.

Limitation Act of 1871, Art. 129—Suit to set aside adoption —Limitation—Invalid Adoption in 1862 and adopted boy and his heirs in possession of properties of adoptive father from 1862 to 1876—Death of adoptive mother in 1902—Suit by reversioners to recover properties of last owner within 12 years thereof—Limitation—Right barred under Art. 129 of Act of 1871 not revived by Act of 1877—Res-judicata—Hindu Law—Widow—Decree against, based on limitation not res-judicata against reversioners.

In a suit brought by the reversionary heirs of a Hindu within 12 years of the date of the death of his widow Chockammal in 1902 for possession of his properties, it appeared that in 1862 the widow adopted to her husband one Alagasundara, that the adopted boy and, after his death, his heirs, enjoyed the suit properties till 1876 by virtue of the rights of Alagasundara as such adopted son, that in that year Chockammal trespassed upon the suit properties, and that Alagasundara's widow thereupon instituted a suit (O. S. No. 9 of 1887) against Chockammal and obtained a decree for possession on the ground that Chockammal's right became barred by limitation. In that suit it was also held that the adoption of Alagasundara was invalid on the ground of his being an orphan at the time of his adoption. The defendants were, amongst others, Alagasundara's widow and alienees from her, and they pleaded that the suit was barred by limitation because a suit to set aside the adoption of Alagasundara was barred under Art. 129 of the Limitation Act of 1871, and the right so barred under that Act was not revived by the Act of 1877. They also pleaded that the suit was barred by res-judicata by reason of the decision in the suit by Alagasundara's widow against Chockammal. They relied upon *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* [1], and *Mohesh Narain Munshi* v. *Taruck Nath Moitra* [2], in support of the former contention and upon, *Hari Nath Chatterjee* v. *Mothurmohun Goswami* [3], in support of the latter. Their Lordships upheld the former contention distinguishing the decision of the Privy Council in *Tirbhuwan Bahadur Singh* v. *Ramesher Baksh Singh* [4], and

1. (1886) I. L. R. 13 C. 308. (P. C.)
2. (1892) I. L. R. 20 C. 487. (P.C.)
3. (1893) I. L. R. 21 C. 8. (P. C.)
4. (1906) I. L. R. 28 A. 727. (P.C.)

overruled the latter distinguishing, *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1].

A. Krishnaswami Aiyar for Appellant.

The Hon. The Advocate General, T. V. Gopalaswami Mudaliar, Hon. Mr. T. Rangachariar, S. Muthiah Mudaliar and *A. S. Visvanather* for the Respondents.

Chief Justice and Burn, J. *1916, November 8.* — A. S. No. 290 of 1913.

Hindu Law—Adoption—Authority to widow to adopt specified boy—Construction—Principles—Adoption of stranger without any attempt being made to adopt boy named—Validity—Adoption of husband's younger brother—Validity—Custom in Southern India—Practice—Appeal—Plea of invalidity of adoption—Permissibility—Adoption sanctioned by custom—Absence of evidence owing to plea not being raised in Court below—Effect.

Where a Hindu authorised his widow (the authority being contained in a will) to adopt to him either G. or L, minor sons of his uncle S. R, whomever of them his mother might select and the widow adopted a stranger without making any attempt to adopt either of the boys named, both of them being available, *held*, in a suit to set aside the adoption that, even if the authority was held to be a general one authorising the widow to adopt any other than the boys named in certain contingencies (a point on which their Lordships did not express any definite opinion) the widow was bound to comply in the first instance with her husband's directions and the adoption actually made by her without doing so was invalid.

Review of case-law on construction of authority to adopt given by a Hindu.

Quære whether under the Hindu Law the adoption by a widow of a younger brother of her husband is valid. Semble it may be valid in South India as being sanctioned by custom.

The High Court will not allow a plea of the invalidity of an adoption to be raised for the first time in appeal in a case in which it would be perfectly open to the other side to adduce evidence of custom in support of its validity and no such evidence was adduced because the point was not raised in the court below.

The Hon. The Ag. Advocate General, R. Narayanaswami Aiyar and *K. S. Ganesa Aiyar* for Appellants.

V. Ramesam, S. Ranganatha Aiyar, H. Suryanarayanah, K. Sundara Rao, A. Krishnaswami Aiyar and *K. S. Aravamudha Aiyangar* for the Respondents.

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1. (1893) I. L. R. 21 C. 8. (P. C.)

NOTES OF RECENT CASES.

Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ. 1916, November 1. — L. P. A. No. 120 of 1916.

Registration Act (XVI of 1908) Ss. 72 and 77—Suit for compulsory registration—Refusal to accept document for registration by sub-registrar on the ground of delay in presentation—Appeal to the District Registrar—Right of suit.

Where a document was presented in time but the sub-registrar after taking the directions of the District Registrar refused to accept a document for registration as being presented out of time and on appeal from the order of the sub-registrar the District Registrar again refused registration of the document, *held* that it was open to the aggrieved party to maintain a suit for compulsory registration under S. 77 of the Registration Act.

10 M. L. J. 104 and 26 M. L. J. 307, followed; 21 Bom. 699 Dissented from.

A. V. Visvanatha Sastri for the Appellant.

K. S. Ramabhadra Iyer (amicus curiæ) for Respondent.

Ayling and Seshagiri Iyer, JJ. 1916, November 6. — L. P. A. Nos. 110, 111 and 112 of 1916.

Civil Procedure Code, S. 115—Scheme suit—Refusal to add son of hereditary trustee as party defendant—Revision.

Where during the pendency of a suit under S. 92 of the Civil Procedure Code, for removal of the defendant from his office of trustee and for the settlement of a scheme, an application was made by the son of the defendant, to be added as a party on the ground that the trusteeship was hereditary in his family and that his father was not defending the suit properly, *held* that, having regard to the fact that the applicant was practically remediless if his rights were not recognised in the scheme suit, the court below was wrong in refusing to add him as a party defendant.

K. V. Krishnaswami Iyer for Appellant.

G. S. Ramachandra Iyer for Respondents.

Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ. 1916, November 15. — C. M. A. No. 73 of 1916.

Civil Procedure Code, O. 40, R. 1 and O. 43, R. 1 (s)—Order of Lower Court determining that a receiver should be appointed—No actual nomination—Order if appealable.

Per *Abdur Rahim* and *Srinivasa Aiyangar, JJ.* (*Spencer, J.* Dissenting) :

An order determining that a receiver should be appointed is appealable though no actual nomination of a person as receiver has been made.

The Hon'ble the Advocate-General and *K. Bhashyam* for Appellants.

N. S. Rangaswami Aiyangar, for Respondents.

Abdur Rahim,
Sadasiva Aiyar and
Napier, JJ.
1916, November 15.

L. P. A. No. 219 of 1915.

Transfer of Property Act, Ss. 54 and 118—Exchange of immoveable property—Unregistered instrument — Part-performance, doctrine of—Equitable Estoppel—Compensation for improvements—Transfer of Property Act, S. 51.

Where the plaintiffs and the defendants by an unregistered instrument agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house and the defendants erected a costly building on the land which fell to them under that instrument, and the plaintiffs kept quiet and even received an additional amount from the defendants on the ground that the land that fell to the share of the latter was larger in extent and the plaintiffs sued the defendants in ejectment on the ground that the instrument did not pass title :

Held per *Sadasiva Aiyar and Napier, JJ.* (*Abdur Rahim, J.* dissenting) that in the absence of a registered conveyance in writing no title passed to the defendants, that the fact that the plaintiffs took an additional sum of money in ignorance of the fact that they were still the owners did not create an estoppel, and that the plaintiffs were entitled to eject the defendants on payment to the latter of compensation under S. 51 of the Transfer of Property Act.

Kurri Veera Reddi v. *Kurri Bapi Reddi* [1], *Mahomed Musa* v. *Aghore Kumar Ganguli* [2], *Mulraju Lakshmi Venkayyama* v. *Venkata Narasimha Appa Rao* [3], *Ramsden* v. *Dyson* [4], *Plimmer Mayor of Wellington* [5], and *Attorney General of Nigeria* v. *John Holt & Co.* [6]. Referred to.

The Hon'ble The Ag. Advocate-General with *K. Rajah Iyer* for Appellants.

T. R. Venkatarama Sastri for *A. Krishnaswami Iyer* for Respondents.

1. (1904) I. L. R. 29 M. 336.
2. (1914) I. L. R. 42 C. 801.
3. (1916) I. L. R. 39 M. 509.
4. (1866) L. R. 1 H. L. 129.
5. (1884) L. R. 9 A. C 699.
6. (1915) L. R. A. C. 599.

NOTES OF RECENT CASES.

Wallis, C. J., Abdur Rahim and Srinivasa Iyengar, JJ. 1916, November 28. — S. A. No. 979 and 1712 of 1914.

Civil Procedure Code, O. 23 R. 1—Leave to withdraw with liberty to bring a fresh suit—Power of Appellate Court to grant leave.

It is competent to an Appellate Court when reversing the decree of the first court, to grant leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit.

V. K. Srinivasa Iyengar for C. S. Venkatachariar for Appellant.

K. V. L. Narasimham for Respondent.

Wallis, C. J., Abdur Rahim, Oldfield, Srinivasa Iyengar and Phillips, JJ. 1916, November 30. — S. A. No. 838 of 1914.

Malabar Compensation for Tenant's Improvements Act (I of 1900) S. 19—Contracts entered into before the Act, prescribing rates for valuing improvements, if affected.

Contracts entered into before 1-1-1886 between landlord and tenant prescribing rates for valuing the improvements effected by the tenant, are saved by S. 19 of Act I of 1900.

C. V. Ananthakrishna Iyer for Appellant.

Eroman Unni for Respondent.

Ayling and Seshagiri Iyer, JJ. 1916, December 4. — L. P.A. No. 115 of 1916.

Civil Procedure Code, O. 1, Rr. 1 and 10—Appearance by defendant—Omission to file written statement—Defendant if can be declared ex parte.

Per Ayling, J. (Seshagiri Iyer. J. dissenting).—Where a defendant appears in person but does not file a written statement of his defence as required by the Court under O. 8, R. 1, the defendant can be declared ex parte.

Per Seshagiri Iyer, J.—The rule as to declaring a defendant *ex parte* is confined to cases of non-appearance by him and does not apply where the defendant appears but does not file a written statement.

Per Ayling, J.—Omission to file a written statement when required by the Court under O. 8, R. 1, C. P. Code entails the penalties imposed by O. 8, R. 10 and declaring the defendant *ex parte* is one of the orders contemplated by O. 8, R. 10, C. P. Code.

Per Seshagiri Iyer, J.—O. 8, R. 10, C. P. Code applies only to cases of written statements required under O. 8, R. 9 and not to those required under O. 8, R, 1, C. P. Code.

C. Padmanabha Iyengar for Appellant.

N. Chandrasekhara Iyer, amicus curiae, for Respondent.

Oldfield and Phillips, JJ.
1916, December 5. — S. A. No. 333 of 1916.

Malabar Law — Tarwad — Anandravan entrusted with management under Karar—Suit for accounts, by junior member, if maintainable.

When an Anandravan was entrusted with the management of the tarwad properties under a *Karar* to which all the members of the tarwad including the Karnavan were parties and subsequently the junior members sued the Anandravan for accounts of his management,

Held, that, under the Karar, the Anandravan did not become the agent of all the members of the tarwad but was accountable only to the Karnavan and that in the absence of any proof that the Karnavan was in collusion with the defendant or had disabled himself from suing, the junior members had no right of suit.

C. V. Ananthakrishna Iyer for Appellant.

K. P. M. Menon for Respondents.

Wallis, C. J., Abdur Rahim and Srinivasa Iyengar, JJ.
1916, December 6. — C. R. P. No. 521 of 1915.

Presidency Towns Small Cause Courts Act (XV of 1882) S. 38 —Jurisdiction of Full Bench to decide questions of fact.

A Full Bench of the Small Cause Court, sitting under S. 38 of Act XV of 1882 has no jurisdiction to decide questions of fact generally. Nor has it jurisdiction to do so, when the question of fact first arises before it, in consequence of its finding on another question of fact or law.

C. Krishnamachariar for *V. C. Seshachariar* for Petitioner.

A. Narasimhachariar for *V. V. Srinivasa Iyengar* for Respondent.

NOTES OF RECENT CASES.

Wallis, C. J.
Abdur Rahim and
Srinivasa Iyengar, JJ.
1916, December 6.

C. M. A. No. 370 of 1915.

Provincial Insolvency Act (III of 1907) S. 37—Surety for payment of debt by insolvent, if a creditor.

A person who stood surety for the payment of a debt by the insolvent is a creditor within the meaning of that expression in S. 37 of the Provincial Insolvency Act.

In re *Paine:-Ex parte Read* (1897) 1 Q. B. 122.

In re *Blackpool Motor Co. Ltd., Hamilton* v. *Blackpool Mortor Co., Ltd.* (1901) 1 Ch. 77, Referred to.

M. D. Devadoss for Appellant.

A. Krishnaswamy Iyer for Respondent.

The Chief Justice.
Abdur Rahim, Oldfield,
Srinivasa Iyengar and
Phillips, JJ.
1916, December 12.

S. A. No. 217 of 1915.

Malabar Law—Landlord and tenant—Agreement to pay kuttukanom, if valid—Malabar compensation for Tenant's Improvements Act (I of 1900) S. 19.

A contract between a jenmi and a tenant by which the latter agrees to pay a *Kuttukanom* or stump fee, at the rate of 8 as. for every tree planted by him at the time when he cuts and appropriates the same, is not opposed to S. 19 of the Malabar Compensation for Tenants' Improvements Act.

C. V. Ananthakrishna Iyer for the Appellants.

Eroman Unni for Respondent.

Ayling and Seshagiri Iyer, JJ.
1916, December 13.

S. A. No. 100 of 1915.

Hindu Law—Widow—Maintenance—Liability of adopted son, after adoption—Co-parceners of husband, not bound.

One of four brothers constituting a joint Hindu family died leaving a widow. The remaining brothers executed a deed of maintenance in her favour agreeing to pay an annual sum for her maintenance. Subsequently the widow adopted a son to her husband and a division of the entire family properties was effected between the co-parceners.

Held, that in the absence of an agreement to the contrary, the ultimate liability to maintain the widow rested on the adopted son and that he was liable to reimburse the executants of the deed of maintenance in respect of moneys paid by them to the widow under the deed, (1915) M. W. No. 187 followed.

A. V. Visvanatha Sastri for Appellant.

P. V. Parameswara Iyer for *C. V. Ananthakrishna Iyer* for Respondent.

Oldfield and Phillips, JJ.
1916, December 15.

S, A. No. 985 of 1916.

Civil Procedure Code, O. 21, R. 93 (O. C. S. 315)—Right of suit for refund of purchase money—Judgment-debtor having no saleable interest in the property—Sale before the new C. P. Code—Right of suit, if taken away—General Clauses Act (X of 1897) S. 6 (c)—Effect of.

Plaintiff purchased certain properties in court auction on 22-4-1907 and brought a suit for possession of the same. The suit was dismissed on 4-10-1909 on the ground that the judgment debtor had no saleable interest in the property. On 6-8-1914 he sued the decree-holder for recovery of the purchase money. *Held* that the cause of action for recovery of the purchase money arose on the date of the Court sale, that under the old C. P. Code (1882) the plaintiff had a right of suit to recover the purchase money and that the new C. P. Code had not the effect of taking away such a vested right.

Under the new Civil Procedure Code of 1908, an auction purchaser has no right to sue for the recovery of the purchase money in case the judgment debtor had no saleable interest in the property. The only remedy is by way of application under O. 21, R. 93, after setting aside the sale.

The Hon'ble Mr. T. Rangachari and K. Bhashyam for Appellants.

C. V. Ananthakrishna Iyer for Respondent.

Sir John Wallis, C. J. and Napier, J. 1916, December 15. A. S. No. 317 and 318 of 1913.

Religious Endowments—Mutts—Matadhipati—Appointment to juniorship to secure his own position—Validity of appointment—Fraud on the power of a matadhipati.

Where the head of a mutt who claimed his possession under a will and ordination by his predecessor, appointed under a compromise deed another as junior pattam, because the latter set up a rival claim to the headship of the mutt under an appointment by the same predecessor, with a view to secure his own possession to the headship of the mutt, the appointment of the junior is invalid in law. Such an appointment is a fraud on the power of the Matadhipati to appoint a junior keeping in view the interests of the institution.

I. L. R. 16 M. 490, followed.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Appellants.

The Hon. the Ag. Advocate General (S. Srinivasa Aiyangar) for the 1st Respondent.

S. Ramaswami Aiyar for the 2nd Respondent.

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